

## Implications of the impossibility of defining vulnerability among children in a theoretically rigorous way

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## ***Abstract***<sup>1</sup>

This paper takes as its starting point, the impossibility of defining vulnerability among children in a rigorous manner. Accepting that vulnerability is pervasive means admitting that it is cause for public concern only when it exceeds a particular level. Tolerable levels of vulnerability vary greatly, influenced by a many factors, some of them normative. Because it is not possible to define vulnerability rigorously, the only feasible way of ranking threats to children's wellbeing is political. Budgetary allocations, it is argued, however derived, constitute an implicit ranking of society's concerns about vulnerability.

Identifying the absence, within capitalist economies, of the right to decent paid employment, or in its absence, adequate social protection in the form of social assistance, as a primary cause of the poverty that lies at the root of much of the vulnerability experienced by adults and children alike, the paper argues for a political economy approach to understanding vulnerability.

After a glance at some of the expressions of dismay among South Africa's poor in recent years at not having their Constitutional rights to social protection met, the paper trawls through the literature on social justice, in an effort to see how the concepts of needs, rights and deserts have been treated.

Somewhat enlightened but still lacking a rigorous handle on which to hang an approach to understanding vulnerability, the paper looks at the legal instruments for securing child rights in South Africa, principally, the Bill of Rights in the Constitution and the Children's Act of 2005. Detecting a tension between the Act's nomination of the parent (or caregiver) as the agent responsible for seeing to it that children's rights are fulfilled, and the Constitutional promise of access to those rights, the paper examines the consequences for poor children of their parent's inability to discharge their responsibilities by virtue of their poverty.

Speculating on the form that struggles over children's rights might take in the future, the paper argues for a concerted push to compel the state to meet the minimum core obligations contemplated in international instruments. The paper ends with a call for critical analysis of the budgetary process to reveal both the implied orderings of vulnerability, and the means by which these are determined.

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<sup>1</sup> As I did in the longer work from which this paper is drawn (Meth, 2005), I wish to express heartfelt gratitude to Rachel Bray, Selwyn Jehoma, Annie Leatt, Pat Naicker, Fiona Napier, Michael Noble, Laura Poswell, David Woods, Ingrid Woolard and Gemma Wright (in alphabetical order) and especially to my partner Anna McCord. Naturally, any errors in the original and in the present paper are my responsibility.

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## **Introduction**

Much of the present paper is extracted from a piece of work which I did last year for Save the Children Fund (UK) (Meth, 2005). In that work I searched, in vain, for a rigorous way to define vulnerability, as it applied to children. Having had an opportunity to reflect at some leisure on that quest, I now recognise its folly. Accordingly, the present paper takes the impossibility of defining vulnerability as its starting point. The fact that vulnerability is impossible to define rigorously has disconcerting implications; the present paper sets itself the task of discovering and confronting them. In short, the paper poses the question: does the impossibility of defining vulnerability among children in a theoretically rigorous way have implications for the effectiveness of the institutions devised to offer protection against vulnerability?

Vulnerability to myriad contingencies, is and always has been of the essence of the human condition. As Culpitt says:

“Risk and randomness are the twin ‘devils’ of the chance that is the context of lived life. Hedging against malign peril, gambling on possible windfall luck, and avoiding unreasonable exposure to risk, govern so much of our personal and social experience. Given the obvious fragility of life, and its randomness, individual perception of risk typically provoked reflex responses to private sets of complex fears about health, safety and survival.” (Culpitt, 1999, p.3)

Over time, these responses have coalesced into the multifarious arrangements, social and personal (individual or private) characteristic of all societies. Although there are many shared views and values, there are also many culturally-specific aspects to what is conceived of as vulnerability, and, hence, what is deemed necessary to protect against. Since vulnerability is a matter of degree (we are all vulnerable), and since the notion of what constitutes vulnerability is at least partly culturally determined, a search for a rigorous concept of vulnerability cannot succeed. Pursuit of this Will o’ the wisp<sup>2</sup> must end in a quagmire, as did my attempts to pin down the concept in Meth (2005). Acknowledging this allows us to view the problem from the other end, posing the question: what explains the patterns or institutions of protection against vulnerability observed in particular societies? This, in turn, opens the door to a number of questions to do with the arrangements that have evolved or been created to reduce vulnerability. Prominent amongst these is the question of whether or not the arrangements accord with the society’s preferences (always supposing that we can ascertain what these are). From this flows the obvious question of whether or not the arrangements are adequate? Asking the latter question implies that mechanisms for answering it exist, or can be created.

To answer the question of what explains actual patterns of protection against vulnerability, we begin by looking at the notion of social justice, an entry point which

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<sup>2</sup> The will o’ the wisp or *ignis fatuus*, or in plural form as *ignes fatui* (“fool’s fire(s)”) is the phenomenon of ghostly lights sometimes seen at night or in twilight hovering over damp ground in still air, often over bogs. The will o’ the wisp is said to recede if approached. (*Wikipedia*)

directs us straight into the needs and rights-based approaches to social protection.<sup>3</sup> The limits of the ability of these two approaches to explain the shape of the social protection system are reached quite quickly. Having exhausted that line of inquiry, we look at the practical notions or concepts of vulnerability used by a variety of actors concerned with the wellbeing of children, in particular, the state. The institutions created by the latter, of course, are embodied in legal structures of one sort or another. It is here that the limitations imposed by the normative aspects of vulnerability make themselves most painfully obvious. An attempt is then made, using Marxist political economy, to understand these limitations.

But enough now of the contents of the paper—before going any further, it is necessary to explain why it is that a newcomer such as myself seeks to insinuate himself into the illustrious company of the talented, dedicated and hardworking group of researchers and activists (roles that many of them combine), who for years, have toiled in the often heartbreaking field of identifying gaps in the legal and institutional mechanisms for protecting vulnerable children. They work (and occasionally quarrel) with policy makers and civil servants whose unenviable task it is to design and implement practical measures, in the face of enormous resource constraints, for building and maintaining the institutional edifices within which child protection takes place. Then there is an army of service providers, mostly not employed by government, but rather in community-based, faith-based, and other non-governmental organisations, whose daily job it is to confront the outcomes of the failure of the society to vouchsafe adequate protection to defenceless children. Behind the specialist terminology, the acronyms, the legislation, the strategies, the struggles over budget allocations, the sensationalist reporting of individual outrages, what unites these people is the desire to alleviate the sufferings of the innocent.

It was while serving on the Taylor Committee of Inquiry into Comprehensive Social Protection, that I developed an interest in the field of child vulnerability, having for years been passionate about social protection, more broadly conceived. That interest was kindled after I performed the (rudimentary) calculation that showed (depending on where one set the poverty line), that of the roughly one million or so children born in any year in South Africa, more than half were born into poverty. It is self-evident that if somewhere in the region of 40-50 per cent of South Africa's population is poor, and that if fertility rates in poor households are higher than those in well-off, then approximately half the newborns in any year must start their lives poverty—the fact that I was startled by this result is a measure of my naivete.

Given the wealth of experience of those enumerated above, and given also my own demonstrated ignorance, it was with considerable trepidation that I agreed last year to perform a 'scoping' exercise for Save the Children (UK) on orphans and vulnerable children. It were an arrogance for a rank outsider like myself (an economist by training) to imagine that it would be possible to do much more than shine a light in one or two of the corners that have perhaps escaped attention of those who been active in the field for years. The unlit (partially lit?) corner into which the present paper dives exists because researchers in the field of child vulnerability and protection, possibly disheartened by the manifest limitations of conventional economics (Lawson,

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<sup>3</sup> For want of a better term, the whole apparatus intended to guard children against the manifold threats to their wellbeing will be referred to henceforth as social protection. Although the threats they face differ, a similar set of mechanisms and institutions is required to protect adults as well.

2003; Byrne, 1999; Cole, Cameron and Edwards, 1991), appear not to have delved too deeply into the economic underpinnings of vulnerability, other than to observe, as most of them do, that poverty lies at the heart of the problem.

Turning for analytical assistance to conventional economics is of little or no avail because the discipline is hamstrung by its blind endorsement of the market (a fault which it seeks to turn to virtue by describing itself as a value-free and objective social science). Economists of left-wing persuasion are not bound by such nonsense. Free of the prejudices of bourgeois economics, they are able to lay the blame for much of the illfare that is found in capitalist economies, where it belongs, namely in the absence of the right that few capitalist countries bestow on their citizens, the right to a (decent) job.

Conventional economics (whose role is not to challenge the fundamentals of capitalist economies) is incapable of recognising the significance of the fact that the relationship between individuals and the broader social setting within which they co-exist is constituted (and indeed, has to be constituted) in such a manner as to make reproduction of capitalist relations of ownership and production possible. As a result, conventional economics, with its barely-concealed contempt for the other social sciences, lacks a plausible set of tools for dealing with the concept of welfare. Insistent though the discipline is on the importance of welfare, it can contribute remarkably little to our understanding of what welfare actually is.

If the present paper has any contribution to make to the debate on child vulnerability, that contribution originates in its insistence on the need for a political economy approach to an understanding of the institutions that are supposed to protect vulnerable children. Before diving into the debate, let us take a brief (jaundiced?) look at the response of some of the poor to indifferent performance by the state in meeting their justifiable demands.

### **Rights, social unrest and service delivery**

South Africa, despite the rights guaranteed the poor by the Constitution, and the oft-asserted centrality of the wellbeing of the poor to policymakers, illustrates the limits of those rights when it comes to delivery, as opposed to rhetoric. A recent, somewhat bleak analysis by Friedman (2006, p.4) had this to say on the matter:

“... many voters do not enjoy the resources that would enable them to organize to be heard in the public policy debate between elections. Their participation is largely limited to expressing their identities in periodic ballots. Because the poor—about two-fifths of the society—are not heard, their experiences and concerns cannot translate into effective policy. This ensures that they remain mired in poverty and excluded, in a continuing vicious cycle, because participation is largely limited to those with the means to organize.” (Friedman, 2006, p.4).

Lacking the capacity for sustained protest on a systematic basis, communities or relatively small groups of individuals within communities, respond to continuing deprivation with protests that frequently turn violent. An upsurge of these incidents in recent times suggests that the patience and forbearance shown hitherto by the poor

may be giving way to greater activism.<sup>4</sup> This activism, around issues such “lack of housing and sanitation, electricity and water cutoffs” has seen communities rejecting attempts by political leadership (local and national) to lower social tempers.<sup>5</sup> Children are occasionally at the forefront of such actions. A particularly ghastly incident of this sort occurred in August 2004. A report under the headline “Twenty children shot in Harrismith protest” described how 4 500 children, protesting about service delivery, streamed onto the national highway, leaving the police, according to a spokesperson, with no alternative other than shotgun pellets to disperse them.<sup>6</sup> Incidents of this type are, thankfully, relatively rare—the bulk of the protest action seen in recent years in South Africa, appears mainly to involve adults (or, at least, children do not feature prominently in the reports).

One may view the issues over which adults are most upset as a proxy definition of their sense of vulnerability. It is not possible to elicit a similar definition for children’s vulnerability—struggles over children’s rights are unlikely to take a similar form. Although it were a heartening experience if a bottom-up solution to poverty (Dean, 2001, p.57) and the problems associated with it in South Africa were to come about, the chances of this happening in the sphere of children’s rights in the short- to medium-term are slender. Children may occasionally be drafted into protest movements or action by their parents and/or caregivers, or may even act on their own initiative, but the nature of struggle for the implementation children’s rights is such that it is more likely to be conducted by NGOs. Children’s rights NGOs, well organised though they undoubtedly are, and speaking with one voice through umbrella bodies, have generally employed a ‘softly, softly’ approach to government. This contrasts strongly with successful single-issue bodies like the Treatment Action Group (TAC). Highly militant, the TAC does not hesitate to make use of the courts to

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<sup>4</sup> A list of protest actions, drawn from just one newspaper, the *Weekly Mail & Guardian*, gives a flavour of the mood among sections of the poor. Service delivery failures feature prominently among the causes of the disturbances. “March draws attention to plight of homeless”, Hila Bouzaglou, 20 September 2006. “Khutsong: ‘The ANC sold us’”, 22 February 2006. The report says that: “The cause of unrest is economic. People are fed up waiting for jobs and basic services such as electricity, clean water and sanitation.” “Eleven arrested in North West service protest”, 23 January 2006. “Three injured in southern Cape service protest”, 16 January 2006. In this instance: “police threw stun grenades and fired rubber bullets at protesting Power Town informal settlement residents”. “A winter of discontent”, Marianne Merten, 27 May 2005. This article contains a catalogue of the incidents in first five months of the year. Although the list of incidents in the Merten article is long, President Mbeki was still able to argue, and not implausibly, that as yet, “urban unrest over service delivery” has not yet reached the point that would suggest that the country is threatened by the “centrifugal tensions” that have caused collapse elsewhere in Africa. He claimed further that neither these demonstrations nor minority mobilisation present “any immediate danger to our democracy” (“Urban unrest could lead to conflict, says Mbeki”)(*Mail & Guardian*, 25 May 2005, online version).

Growing community assertiveness is not entirely unexpected. Writing a few years ago, Good (2001, p.47) pointed out “the extent of the demobilization in South Africa should not be exaggerated” in spite of the “... systematic (and astonishingly rapid) process of political demobilization...” that took place after 1994, which left many of the institutions of civil society that represent the poor in a weak state. Some commentators, Desai (2002), for example, and Raj Patel and Richard Pithouse, as an article in *Mail & Guardian* May 20 to 26 2005 (pp.30-31) attests, are quite upbeat about the potential of groups representing the interests of the poor.

<sup>5</sup> It remains to be seen whether steps taken by the likes of Housing Minister to address the frustrations of the unhoused and poorly-housed can succeed before “other festering problems adding to the explosive mix” result in major confrontations. The article from which these comments are drawn, by Linda Ensor, appeared under the headline “Protests signal that the patience of SA’s poor is wearing thin” in *Business Day*, 31 May 2005, online version.

<sup>6</sup> See *Weekly Mail & Guardian*, online edition, 30 August 2004.

challenge the state. Children’s rights activists, if they have not already done so, are probably going to have to confront the question of whether or not to adopt a similar approach, at least on problems whose solutions command general agreement, like the poverty at the root of so much vulnerability.<sup>7</sup> The fact that the threats to children’s well-being are so multifarious, and consequently involve so many different actors, appears, to the outsider, to constitute a significant barrier to joint action. NGO involvement in the securing of children’s rights is going to be of as much importance in the future as it has been in the past. With this warning about the likely consequences of a failure to fulfil the promise of the Constitution in mind, let us jump in at the deep end.

## **Social Justice: Rights, deserts and needs**

Children, especially young children, are doubly vulnerable. They rely on adults (or institutions) not only to provide these ‘reflex responses’ to which Culpitt (1999) refers; they depend on adults as well for nurture, physical and emotional, for the duration of a lengthy childhood. Adults, in turn, have come to rely upon the set of institutions that provide, jointly and severally, what is referred to as social protection against many of the risks faced in day-to-day living. One of the major achievements of mankind, comprehensive social protection, makes social justice, as opposed to the nominal equality before the law that individuals in many countries have long enjoyed, possible. Ensuring that children are protected against as many of the threats to their well-being as is possible, is thus part of securing social justice. A suitable starting point to begin addressing the question of the nature of the vulnerabilities against which children are to be protected, and of the institutional arrangements for achieving this protection, is thus in the field of social justice.

As one would expect, the notion of social justice is contested. The disagreements over what constitutes social justice play themselves out in the real world as struggles over its definition, and over the resources to be allocated to its attainment. It is not necessary for us to dig too deeply into the details of the controversies over social justice here. Suffice it to say that views on social justice of the three major schools of thought in the social sciences, the libertarian (neo-liberal); the utilitarian or liberal / social democratic, and the Marxist, may all be illustrated by reference to their standpoints on rights, needs and deserts, the “... three distinct elements ...” of social justice. Following Barr (1998), who, in turn, is summarising the work of Miller (1976), the three elements may be defined as follows:

- “*rights*—e.g. political liberty, equality before the law;
- *deserts*—i.e. the recognition of each persons’ actions and qualities;
- *needs*—i.e. the prerequisites for fulfilling individual plans of life.”

Even if not amenable to “precise theoretical definition ... each element is a logically distinct principle embodying a particular type of moral claim”. As examples, Barr notes that ‘deserts’ implies that someone who works longer hours should receive more

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<sup>7</sup> Campaigns around poverty reduction are difficult to mount and sustain. The BIG (basic income grant) coalition is probably the closest thing that there is to an organisation with a focus of this sort—it is either ignored or brushed aside by government.

pay; 'needs', that someone unable to work should not be left to starve. He then goes on to argue that rights and deserts *can* be reconciled, giving as example the claim that a person should have the right to keep all income legally earned. Less contentious is the proposition that rights and needs *can* be compatible (a sick person should be entitled to health care, for example). The real battleground is where deserts and needs meet—the example offered is classic:

“... if I am rich and healthy and you are poor and ill, then either I am taxed (and do not receive my deserts) to pay for your medical treatment, or you receive no treatment (hence your need is not met) so as to protect my deserts.” (Barr, 1998, p.53)

Emphasising in the text above, the ‘can’ that points to the *possible* reconciliation of rights and deserts, and the *possible* compatibility of rights and needs, is intended to draw attention to the fact that the nature and extent of the rights, the needs and the deserts in question, have an important bearing on whether or not the compatibilities are found and the reconciliations take place. Beyond some basic level, neither rights nor needs may be regarded as absolute in any sense. It is only a slight caricature of politics to say that progressives wish to extend the reach of rights, and the needs that they address, while conservatives seek to limit both. It is also not unduly crude to observe that conservatives generally seek to protect the deserts (the entitlements) of those whose income would furnish the wherewithal for the meeting of needs of those who have not. Arguments advanced in support of such protection vary in strength from Nozick’s simple assertion of the right of an individual not to be ‘robbed’ by the state (through) taxation of income legally earned (Barr, 1998, p.46), through to the somewhat vaguer fears of the ‘tyranny of the majority’ (the poor, who constitute the majority, voting “... for ‘too large’ a public expenditure programme...”, a possibility commented on de Toqueville in 1835) (Cullis and Jones, 1992, p.110). In addition, the virtue of self-reliance (avoidance of the corrosive power of dependence) is frequently urged upon the poor.

Addressing the problems faced by vulnerable children (a process that involves defining vulnerability in the first instance) entails the discovery of an appropriate balance among rights, needs and deserts. Since socio-economic life is dynamic, such a balance, if achieved, can never be anything other than dynamic itself.

There is an additional consideration: with varying degrees of enthusiasm, all left-of-centre political movements share the aspiration of liberty, fraternity and equality. The meaning that they attach to each, liberty and equality in particular, may differ, but support for the battle-cry is not to be doubted. Of relevance here, is the Marxist perception that:

“Liberty is a much more active concept than the mere absence of coercion. It cannot exist where economic or political power is distributed unequally, nor where the actions of the state are biased ... ; freedom, moreover, includes a substantial measure of equality and economic security.” (Barr, 1998, p.58)

Widely rejected by conservatives because of its implications (amongst them, demands on the fiscus for the material resources required to make freedom thus conceived, a

reality),<sup>8</sup> this perception gives notice of what is necessary to make some ‘rights’ a reality. As such, it should stand as a warning to all who prattle about rights without consideration of what is involved in securing them. With this in mind, let us consider, in turn, the needs and rights-based approaches to social protection, to see how much insight they can provide on the question of children’s vulnerability.

## Needs

In an attempt to discover an approximation of the ordering of welfare priorities that could emerge from (an ideal) democratic process, we turn to the business of ‘describing situations in terms of human needs’, an approach implicitly frowned upon by human rights advocates. What follows is a trawl through the literature to see if there is any way of specifying, *a priori*, the needs that must be met if vulnerability is to be minimised. The exploration below is limited in that it concerns itself chiefly with those variables that economists consider, when it is clear that a multi-disciplinary approach (looking at both material and emotional needs) is required. The fact that the discussion focuses mainly on economic variables is unfortunate, but not fatal.

The start is not encouraging—conventional economics does not handle the problem of identifying needs very well. Rather, it ducks the problem altogether, burying it in pointless discussion about necessities and luxuries and marginal and total utilities, with occasional reference to that historical oddity, the Giffen good. More serious works concerned with welfare, like Nussbaum’s and Sen’s *The Quality of Life* (1993) or Partha Dasgupta’s monumental *An Inquiry into Well-Being and Destitution* (2000 [1993]) treat the matter with greater intellectual rigour (and honesty). Dasgupta, for example, states that:

“The claims of needs suggest a sense of urgency. They hint, but only hint, at a preemptory [pre-emptive] argument. Basic needs display these features in a sharp form. We can postpone listening to a piece of music or going to a party, but we can’t postpone the consumption of water when thirsty, or food when hungry, or medical attention when ill. Such needs have lexicographic priority over other needs in our own evaluation of goods and services ... The meeting of these needs is a prerequisite for the continuation of one’s life. Their fulfilment makes life

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<sup>8</sup> The long passage below from the pens of two prominent libertarians, Lal and Myint (1996), laced with contempt (and alarm), shows that conservatives are under no illusion about the implications of demands for ‘rights’ to be met. They state that:

“The locus and nature of the argument of those who want to use the state to promote egalitarianism has ... shifted in a subtle way. In the past such activists, who sought to transform society through state action, usually argued in favour of some form of revolution whereby the anointed would seize power and irreversibly transform society, if necessary by indoctrination to create a New Man. With the revolutionary route at least tarnished by the hideous outcomes in Communist countries—which even fellow-travellers now concede—a new constitutional mania has set in. This emphasizes substantive social and economic rights in addition to the well-known rights to liberty—freedom of speech, contract, and association amongst the most important—emphasized by classic liberals. It seeks to use the law to enforce these rights, based partly on needs, and partly on the ‘equality of respect’ desired by a heterogeneity of self-selected minorities differentiated by ethnicity, gender and/or sexual orientation. But no less than in the collectivist societies that have failed, this attempt to define and legislate a newly discovered and dense structure of rights (including for some activists those of non-human plants (*sic*) and animals) requires a vast expansion of government’s power over people’s lives. Their implementation moreover requires—at the least—some doctoring of the market mechanism.” (Lal and Myint, 1996, pp.314-315).

*possible*. For life to be *enjoyable*, other sorts of goods are required.” (2000[1993], pp.39-40, emphasis in original)

This is all very well, but it still leaves us with the problem of distinguishing needs from wants. Theory cannot, however, provide any more guidance than that suggested above. Nevertheless, the distinction must be made in practice, because as Dasgupta argues:

“Needs provide a most valuable marker for guiding public policy. The observation that needs vary, that there are different types of needs, that there are wants which are not needs, is not much more than a banality. We could make the same observation about well-being, or for that matter about preference fulfilment and functionings. But it would be grotesque if these concepts were for that reason banished from the political lexicon. What would political morality then be about?” (2000 [1993], p.40)

At the same time as one acknowledges the force of Dasgupta’s argument, one must also admit that approaching the problem of defining vulnerability *a priori* using a needs-based approach does not offer much promise. Although there will be some universals, such as the need for shelter and adequate nutrition, that discovery cannot take us very far. In the absence of a democratic process that reveals preferences,<sup>9</sup> the search for the list of ‘needs’ that must be met if vulnerability is to be held to some acceptable minimum appears to be an inescapably empirical matter.

Asserting that developing a definition of vulnerability that enjoys widespread acceptance is an empirical matter, cannot not eliminate the difficulties inherent in such a process. Children’s rights activists are by no means immune to the pleading of special interest groups among their number, seeking to persuade the community in general of the importance of their cause. As Feeny and Boyden (2003, p.ii)<sup>10</sup> argue:

“The creation of categories of ‘especially vulnerable children’ such as street children, AIDS orphans and child sex workers has led to disproportionate attention at the expense of other children suffering similar but less visible threats to their protection. It also appears that the vulnerability of such groups is in many cases overstated or misplaced, and being singled out in such a way may unintentionally further their stigmatization.”

From the policy point of view, there can be no halt to the search for vulnerable groups. The needs uncovered in this continual search are likely to change over time. There will also be regionally specific needs. In multi-cultural societies, it is also to be expected that there will be differing patterns of needs. A consultative political process is required to rank needs in order of priority, if only because as economists never tire of pointing out, demands are infinite but the resources available to begin satisfying them are not. Individual activist and special interest groups can expend

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<sup>9</sup> The market, tried and trusted revealer of less fraught preferences, is of even less use than any of the processes discussed here.

<sup>10</sup> The paper by Feeny and Boyden (2003) was brought to my attention by Ms Annie Leatt of the Children’s Institute in Cape Town. It came a bit late in the day for all the critical insights it offers to be incorporated into the present paper. It is unlikely that I have not fallen into some the numerous traps for unwary travelers in the land of the vulnerable to which it draws attention.

their energies in whatever manner their conscience dictates—at the national level, there is no escaping the need for a means of ranking problems in order of severity.

This is no simple task. If democracy really worked (and if children of all ages could articulate their needs), those affected could make known their demands. Means to assess these claims could be developed, and from that could emerge an ordering of the problem, one which would serve as a guide to policymakers and activists alike. From time to time, signals (both of the spontaneous and the systematic sort) do emerge from civil society on aspects of these demands. The information is, however, usually too noisy, and the coverage too sketchy, to contribute much to sound policy design. Let us see what the rights-based approach has to offer.

### **Rights<sup>11</sup>**

As the leading capitalist economies slowly grew past their brutal periods of primitive accumulation, social protection against contingencies gradually began to supplant private arrangements made to cope with risk. A flurry of activity in the post-World War II period saw the consolidation in many countries of diverse programmes into the comprehensive systems that came to be known as the welfare state. These systems, coupled with steady economic growth, produced states of well-being never before experienced among common folk. They performed as well, the valuable function of damping down on working class resentment at bearing the bulk of the burden of illfare in society.

The spirit of the age was captured in the Universal Declaration of Human Rights, adopted in 1948, which sanctioned the growth of rights-based systems. Article 25 of the Declaration states that:

- “(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

Full compliance with the Declaration is no trivial matter—Article 23 guarantees everyone the right to work (not to a job) and to protection against unemployment.

It was not until 1989 that all of the “... standards relating to the specific concerns of children ... expressed in legal instruments such as covenants, conventions, and declarations” ([www.unicef.org/crc/crc.htm](http://www.unicef.org/crc/crc.htm)) were brought together in the Convention on the Rights of the Child. These rights are laid out in 41 articles. As one would

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<sup>11</sup> Conservatives are scornful of the rights approach, dismissing it as “ ‘rights chatter’—the clamour for numerous and newly discovered individual rights...” They see the granting of rights as part of the explanation of the crisis of the welfare state, and observe that “It is then particularly ironical that, at a time when the welfare state is coming to be repudiated by its progenitors, international institutions such as UNDP, UNICEF, and WIDER are seeking their extension in the Third World.” (Lal and Myint, 1996, p.381)

expect of a document that was ten years in the making, having overcome “[i]nitial indifference and political confrontation” (Pais, 1999, p.5), the articles cover almost every eventuality. According to Pais (1999, p.iv), the significance of a rights-based approach is that it means:

“... describing situations not in terms of human needs, or areas for development, but in terms of the obligation to respond to the rights of individuals. This empowers people to demand justice as a right, and not as charity.”

Although the Convention on the Rights of the Child does not define vulnerability, a definition may be inferred from the rights these instruments confer. In recognising the “right of every child to a standard of living adequate to a child’s physical, mental, moral, spiritual and social development”, Article 27 of the Convention on the Rights of the Child is implicitly stating that circumstances which deny the child that standard of living (poverty being the most likely), make the child vulnerable to under-development in each of the spheres listed.

Thinking about rights-based protection against vulnerability obliges us to consider the very different forms of intervention required to provide protection. To deal with this problem, it is conventional to distinguish between positive and negative rights. The notion derives from a distinction made between those rights which entitle us to make:

“... a claim *to* something, a share of material goods ... or of some particular commodity, such as education when young, and medical attention when in need.... A negative right, on the other hand, is a right for something *not* to be done to one, that some particular imposition be withheld. It is a right not to be wronged intentionally in some specified way.” (Dasgupta, 2000 [1993], p.45, emphasis in original)

Crudely speaking, the ability to guarantee positive rights is a function of the ability of the society to alleviate the worst effects of poverty (or better still, to eradicate it altogether). Negative rights can be guaranteed if a society can (i) inculcate among adults, an intolerance of the flouting of children’s rights, and (ii) can create the legal structures and social services necessary to detect and punish wrongdoing when it occurs, and (iii) can attempt to repair children whose negative rights have been infringed. This division corresponds (for example), roughly with the division of activities in the national Department of Social Development—on one side there are social grants (now hived off into the South African Social Security Agency), and on the other social services. In practice, infringements of the two types of rights are probably not separated in this tidy fashion—it is almost certainly the case that both are negatively related to income (expenditure) level. The distinction does, however, have its uses—it is probably true to say that in a highly unequal society like South Africa, it would be easier to harvest additional taxes required to fund social services when abuse begins to prick the conscience of the well-off. Finding the fiscal resources to tackle poverty by means of social grants for those who fall through the gaps in the social protection system, by contrast, is likely to prove a much harder task. This has implications for the enforcement of positive rights for children.

Although the logic of the rights-based approach to social protection is persuasive, it is not without problems.<sup>12</sup> Recall from the discussion above, the assertion that it means:

“... describing situations not in terms of human needs, or areas for development, but in terms of the obligation to respond to the rights of individuals. This empowers people to demand justice as a right, and not as charity.”

The text from which this observation is taken (Pais, 1999) is silent on the question of how the newly-empowered are to demand satisfaction of their rights.<sup>13</sup> Not all commentators conflate the existence of a right with the ability to exercise it. In a piece that seeks to put the rights-based approach to development into perspective, Cornwall and Nyamu-Musembi observe that:

“Ultimately, however it is articulated and operationalised by a development agency, a rights-based approach would mean little if it had no potential to achieve a positive transformation of power relations among development actors. It must be interrogated for the extent to which it enables those whose lives are affected most to articulate their priorities and claim genuine accountability from development agencies, and also the extent to which the agencies become critically self-aware and address inherent power inequalities in their interaction with those people.” (2004, p.1432)

A moment’s reflection on this statement makes it clear that the nature of the right in question, and that of the ‘development agency’ whose job it is to facilitate its delivery are critical determinants of the likelihood of its being delivered. Within the household, parents or caregivers are, or should be, the guarantors of many negative rights, freedom from abuse of all kinds being one of the more important among them. Transformation of power relations among small children and adults is not achieved by the passage of a bill of rights, be it never so comprehensive. Some positive rights are cast in such general terms that it becomes difficult for ‘development agencies’ to act on them. For example, we know that in South Africa, millions of poor go hungry. We also know that the Constitution grants everyone the right not to go hungry. Clearly, the existence of the right is not sufficient to prevent hunger. The likely reason for the gap between the promise and the reality is the inability of the poor and/or oppressed to make demands effectively.<sup>14</sup> To put it bluntly, they lack often the political power to enforce their demands.

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<sup>12</sup> As Cornwall and Nyamu-Musembi (2004, p.1419) observe “Rights-talk can function differently from different mouths. It depends who is speaking about rights and where they are speaking ... The same language that may be rhetorical fluff in one place may be words of extreme courage and radical change in another. The use of rights-talk in Washington or Paris might be used piously as new words for the same old liturgy in the cathedrals of international trade and development ... But from another place (a slum or the scene of a rigged election) and spoken from another voice (that of poor man or a woman rights lawyer) the same words of rights-talk could function prophetically as a redress to change and challenge power.”

<sup>13</sup> One of the empowerment tools is the accessible and highly informative resource book on socio-economic rights edited by Liebenberg and Pillay (2000). It would be interesting to know what use had been made of it. The publication is being updated. An electronic version is also being developed. *pers comm.* Sibonile Khoza, University of the Western Cape, May 2005.

<sup>14</sup> The landmark *Grootboom* case that “... gave rise to South Africa’s watershed Constitutional Court ruling on socio-economic rights” has not been followed by a decision “... about government’s fulfilment of its obligations based on the unqualified socio-economic rights given to children...” (Coetzee and Streak, 2004, pp.61 and 63)

Cornwall and Nyamu-Musembi (2004, p.1417) sum up the different implications for policy implied respectively by ‘rights-based’ and ‘needs-based’ approaches as follows:

“Some commentators ... argue that whereas a needs-based approach focuses on securing additional resources for delivery of services to particular groups, a rights-based approach calls for existing resources to be shared more equally and for assisting the marginalised people to assert their rights to those resources. It thus makes the process of development explicitly political. The two can be motivated by radically different things: needs can be met out of charitable intentions, but rights are based on legal obligations (and in some cases ethical obligations that have a strong foundation in human dignity even though they are only in the process of being solidified into legal obligations). Commentators also draw attention to contrasts between the normative force of a rights-based approach and utilitarian-driven approaches such as ‘low cost high impact’ project approach and cost-benefit analysis. A rights-based approach, for example, is likely to give priority to severe or gross types of rights violations even if these affect only a small number of children, while these other approaches would offer a basis for justifying a focus on less severe types of violations that affect a larger number of children.”

One discovers that in practice, decisions are made on the basis of both types of approach. It is not always obvious when this is being done. In my report for Save the Children (UK) I argued that the death of an infant or child constituted evidence of the most extreme form of vulnerability. From this I concluded that there was a strong case for according the highest priority to policies aimed at reducing child and infant mortality rates. Stepping back to analyse the implications of this suggestion, I argued that:

“... it is clear that the view that the right to life of infants and under-fives sits squarely within the (normative) rights-based tradition. In so doing it gives ‘priority to severe or gross types of rights violations even if these affect only a small number of children,’ and relegates to second place ‘less severe types of violations that [possibly] affect a larger number of children’. Whether the broader society shares this view is something that needs to be ascertained. ... the political process, which should disclose these preferences, fails, for a variety of reasons to do so. That being so, there is no way of knowing if the current budgetary allocations (which constitute an implicit ordering of vulnerabilities) reflect society’s choices, the wishes of planners, the predilections of the various ministers of state or the desire of the state to accommodate the multitude of pressure groups seeking to advance particular child rights. Steps to dispel this ignorance are urgently required.” (Meth, 2005, p.27)

What this implies is that there is a need to interrogate actually existing policy, the better to understand the imperatives that have given that policy its present shape. Policy to protect children against threats to their wellbeing is informed in South Africa by the Bill of Rights in the Constitution. That document, however, can only offer limited guidance to policymakers. The drafting of law and the creation of institutions to protect children is an immensely complex affair. The interrogation of

policy cannot be limited to an examination of the condensation process that translates the threats to children's well-being into carefully crafted legal instruments that spell out children's rights. Although these instruments cover almost every contingency against which children require protection, one cannot infer from them, any ordering of the severity of the multitudinous threats to children's well-being.

Life is breathed into the institutions and practices of child protection by the process of allocating the fiscal and other resources they need to sustain them. Budgetary constraints are real, so too are the limits of the capacity of the various bodies implementing children's rights. Budgetary (and resource) allocations constitute an implicit weighting of the various needs.<sup>15</sup> That weighting corresponds to a definition of vulnerability, ranked in order of the severity of the perceived threat. To reveal the ordering implied by existing allocations, it is necessary to interrogate budgetary processes as well. Discovering whether or not the revealed ordering corresponds with what 'society' wants is only possible if that ordering is exposed to the harsh light of day. It is time to debate this matter openly, not flinching in the face of some of the really cruel questions<sup>16</sup> which such a discussion is bound to raise. It is also time to begin raising questions about whether or not the institutions created, legal and other, are appropriate and adequate for the problems they seek to address.

### ***Social protection of children in South Africa***

Children may be harmed by acts of commission and of omission. Sexual abuse would be an example of the former. The latter could take two forms: it could be either willful or involuntary. If a child is prevented from attending school (an important right) because its labour in the fields is necessary, the intention would not be to harm the child. Willfully preventing a child from attending school for cultural reasons, would be an act of commission. As such, it is likely to bring the individual or group of individuals responsible into conflict with the authorities, if school attendance is enshrined as a right within the legal system. If a child were to go unfed because the cupboard was bare, that would be an act of involuntary omission. A common unwitting act of omission is that of failing to foster a child's 'physical, mental, moral, spiritual and social development' simply for want of the wherewithal, or the knowledge of how to do so.

Rights-based approaches attempt to deal with acts of commission and of omission. The 'shopping lists' constructed to cover these eventualities yield loose 'definitions' of vulnerability. An example of this is to be found in the White Paper for Social Welfare. This offers a list of children to be regarded "... as especially vulnerable by policy-makers and service delivery agencies" (presumably it was not thought to be exhaustive when written). It reads as follows:

- Children from birth to 36 months;

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<sup>15</sup> It has the feel (to an outsider) of an attempt to do everything. The impression created by the literature is that this leads to most things being done badly.

<sup>16</sup> As an example, medical doctors, labouring under constraints of time and shortages of supplies of vital drugs and equipment are compelled to make uncomfortable decisions about where (on which patient) to concentrate their scarce resources.

- Pre-school children in the age group 3 to 6 years who, because of poverty and/or other factors, have insufficient access to early childhood development services;
- Children requiring out-of-home care;
- Children with disabilities;
- Children with chronic diseases, including HIV/Aids;
- Children who are abused and neglected;
- Street children;
- Children engaged in labour that decreases their well-being;
- Children abusing substances;
- Children of divorcing parents;<sup>17</sup> and
- Children suffering from insufficient nutrition. (Cited in Streak and Poggenpoel, 2005, p.13)<sup>18</sup>

Finding valid reasons for excluding any of these categories of children from the list would not be easy, if anything, we would want to add to the list. Orphanhood, for example, unless it is subsumed under one of the categories, is conspicuous by its absence. Not much imagination is required, however, to see that the problem of identifying those among this list in need, or even most in need of welfare services, is formidable.

The ‘Save the Children’ approach in South Africa, with its focus on orphans and vulnerable children states that an:

“[O]rphan is a child under 18 who has lost one or both parents; vulnerability will be determined at community level and includes children living with sick parents, children living in poverty, abused, disabled, abandoned, destitute or displaced, including non-national children.”<sup>19</sup>

These ‘definitions’ of vulnerability are consistent with the primary instruments seeking to safeguard children’s rights: as argued above, the separate elements of the definitions may be derived from the instruments. At an abstract level, the ‘definitions’ of vulnerability reproduced above refer to states or conditions in which unmet needs have arisen, or are likely to arise. One set of needs are those that would have been met if positive rights had been honoured, the other if the negative rights had as well. These needs are both material and emotional. Attempts to address both types of need is made in the constitutional provisions, and subsequent legal enactments, to which we now turn.

Social protection in the South African Constitution (1996) is rights-based. The Bill of Rights in the Constitution vouchsafes social security (and sufficient food!) to all, subject to the ‘available resources’ and ‘progressive realisation’ clause (s27(3)).

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<sup>17</sup> It is important to note that the way in which some of the conditions are specified is crude. Not all 0-3 year olds, for example, are vulnerable in the sense in which the term is generally used—the vulnerability of those with the good fortune to be born into comfortable circumstances and with caring parents, is the possibility of the loss of those circumstances. Similarly, in a small but probably not insignificant number of cases, being the children of divorcing parents may mark an improvement in a child’s welfare.

<sup>18</sup> Some of the details of what these conditions imply are examined in Robinson and Biersteker, 1997, pp.66-67.

<sup>19</sup> *pers comm.* Ms Fiona Napier, Save the Children (UK), Pretoria, May 2005.

Children's rights in the Constitution are spelled out in Section 28. Fully ten years were to pass before a new piece of legislation, giving effect to the constitutional provisions, was assented to by the President. The Children's Act, Act No. 38, 2005, was passed by National Assembly plenary in December 2005 and assented to by the President in June 2006 (Government Gazette No. 28944). Its passage was not without controversy, stirred up by a provision in the Bill banning the cultural practice of virginity testing (Jamieson and Proudfoot, March 2006). There is still some way to go before the act is complete. Provisions omitted from the 2005 Act are contained in an Amendment Bill (tabled in July 2006). After working their way through all of the many stages of the legislative process, these will ultimately be incorporated into a single act, possibly by 2008 (Jamieson and Proudfoot, March 2006).

It is worth reproducing in full, the objects of the Children's Act, 2005. Chapter 1, section (2) tells us that they are:

- (a) to promote the preservation and strengthening of families;
- (b) to give effect to the following constitutional rights of children, namely
  - (i) family care or parental care or appropriate alternative care when removed from the family environment;
  - (ii) social services;
  - (iii) protection from maltreatment, neglect, abuse or degradation; and
  - (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
- (c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;
- (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- (e) to strengthen and develop community structures which can assist in providing care and protection for children;
- (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (g) to provide care and protection to children who are in need of care and protection;
- (h) to recognise the special needs that children with disabilities may have; and
- (i) generally, to promote the protection, development and well-being of children.

Although the (South African) Children's Act (like the Convention on the Rights of the Child), does not explicitly define vulnerability, it is possible, by working one's way through the objects of the Act to infer, from its provisions, a definition of sorts.<sup>20</sup> So, where the preamble of Children's Act states that every child has the rights set out in Bill of Rights of the Constitution, we can infer, for example, from the provisions in sections (28)(1)(c) and (d) granting children the right:

- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;

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<sup>20</sup> It is also possible to infer a definition of vulnerability from the definition of 'care' in the section (1) of the Act.

that children may be vulnerable to deprivation of the essentials in (c) and may be subjected to the evils of (d).

It is necessary, however, to be able to more than merely infer definitions of vulnerability from legal instruments, either national or international. To say this is not to suggest that the Children's Act (or Convention on the Rights of the Child and similar instruments) is not essential, it clearly is. Rather it is to argue that a clearer understanding of the nature and extent of the vulnerability of the nation's children must be sought elsewhere. The reasons why such an understanding is necessary are obvious: guidance is required for those who must frame programmes of action. It is not possible to bid rationally for scarce budgetary resources unless there is some measure of the extent of vulnerability to each of the many threats children face. The search for a concept of vulnerability has thus become a search for a way to express the extent and relative severity of the multitude of threats to children's well-being. Although there may be differences of interpretation and emphasis, individual threats are all well enough understood (and defined in the relevant legal documents). It is the combination of threats that needs to be pinned down. This complex question, which we shall not pursue here, appears not to have been addressed systematically.<sup>21</sup>

Instead, we will dive into another murky pool, that containing the question of how the rights enshrined in the Children's Act are to be asserted. There is a tension between the provisions in the Bill of Rights as they apply to children, and the Children's Act of 2005 which is supposed (intended) to give effect to them. Before considering it, let us look briefly at the response of (some of) the poor in South Africa to the perceived failure of the state to live up to the promise of the constitution.

### **Rights enforcement: A tension between the Act and the Constitution**

At the beginning of this paper it was asserted that the involvement of NGOs in securing children's rights was unlikely to diminish in intensity in the future. The reasons why we are likely to see an increase in NGO activity (rather than the reduction one might have looked forward to after the monumental task of participating in the creation of the Children's Act of 2005 had been completed) become clearer when we look at the problems of enforcement.

The Children's Act of 2005, product of a long consultation process closely involving most of the organisations concerned with children's rights (Proudfoot, 2005), gives effect to constitutional rights by specifying those rights, as we have seen above, in some detail, and by laying down a set of penalties for contraventions of the various provisions of the laws protecting children (according them negative and positive rights).

Enforcement of the Act is discussed in Chapter 20, Section 5 of which spells out the offences it envisages. Sections (305)(3)(a) and (b), and Section 305(4) for example, identify a series of offences, all of which take the form of a failure to meet the provisions of the Bill of Rights. Responsibility for discharging the duties in question

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<sup>21</sup> In Meth (2005) I sketched a direction in which such an inquiry might have to travel, and began asking some of the harsh questions that entailed.

(they secure children's rights not to be abused, deliberately neglected,<sup>22</sup> to have adequate food, clothing, lodging and medical assistance), rests upon a responsible individual or individuals (parents, guardians, care givers and the like). In this, the Act follows Article 27 of the UN Convention on the Rights of the Child (UNCRC), and Article 20 (1) of the African Charter (AfCRWC) on the Rights and Welfare of the Child (Rosa and Dutschke, 2006, p.14).

Relief can presumably only be granted by the courts on a case by case basis. Under conditions of mass poverty, some large number of people may, through no fault of their own, deprive children of adequate food, shelter, clothing and medical attention. If the children concerned are to assert their rights, there would be little point in bringing an action against responsible individuals whose poverty prevents them from discharging the duties the law requires of them. Rather, one imagines, the route to relief would lie through section 27(1)(c) Constitution, which guarantees right of access to "social security, including if they are unable to support themselves and their dependants, appropriate social assistance". Insofar, therefore, as contraventions of the Children's Act occur because the responsible individuals (those with the legal liability to make the relevant provision), are too poor to comply, the Act cannot give effect to the relevant provisions of the Constitution.

Even though the Children's Act is not yet in force, this matter has already begun to exercise the minds of those who have struggled (and continue to struggle) hard and long for children's rights. Rosa and Dutschke (2006) have addressed the problem, noting that "there is still uncertainty as to:

- how children's rights should be interpreted,
- what the content of each right is,
- what the extent and nature of the obligations placed on the government are, and
- how this can be translated into practical delivery." (p.iii)

Since the Children's Act is not in force, it is necessary to search for clues in the jurisprudence of the Constitutional Court. The signs are not encouraging. Details of the well-known Grootboom case, and an analysis of the judgement in the Constitutional Court are sketched in their paper (2006, p.19). This case offers one of the few indications of how the courts view the respective responsibilities of parents and the state. In essence, the Constitutional Court's position seems to be that the state is not obliged to meet the section (28)(c) rights (in the Grootboom case, the right to shelter) on demand. The order requiring the state to provide shelter was made in terms of section (26), which deals with people's rights to adequate housing. It was found that the state had not taken reasonable steps to ensure that its housing policies could meet the needs of people in crisis (Rosa and Dutschke, 2006, pp.19-20). We see the rights-based approach in action when it comes to defining what the

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<sup>22</sup> One wonders why the term 'deliberate neglect' is used so explicitly? It occurs again in Section 46(1)(h)(v), which allows a Children's Court to make an order allowing a hospital to retain a child where there are reasonable grounds for believing it has been subjected to 'deliberate neglect'. Is this an acknowledgement of the likelihood of unintentional neglect occurring, mainly as a result of the incapacity of the responsible person to discharge their duties? The definition of neglect: 'a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs' (Section (1) ) does not help very much.

‘reasonableness’ standard is that is used to assess a state programme, in the Grootboom case, its housing programme. Rosa and Dutschke list six conditions:

- “the programme must be reasonable in conception and implementation;
- it must be balanced and flexible;
- it must pay attention to crisis situations;
- it must deal with long, medium and short-term needs;
- it may not exclude a significant segment of society, and finally,
- the programme must prioritise the needs of the most desperate.” (2006, p.20)

Unlike the section (27)(1) rights, which are qualified in section (27(2) by the ‘weasel’ clause which requires the state to take “reasonable legislative and other measures” to “achieve the progressive realisation” of the rights “ within its available resources”, the section (28) rights are “not qualified by reference to reasonable measure, progressive realization or resource constraints” (Rosa and Dutschke, 2006, pp.15-16). If the primary agents (the parents, for example) responsible for ensuring that a child’s section (28) rights are met, fail to do so by virtue of their poverty, then presumably, if they were prosecuted, they would be able to claim that in their case, the state had not taken reasonable steps to ensure that children living with their families could enjoy the section (28) rights.<sup>23</sup> They could also appeal through the Court for “appropriate social assistance” referred to in section (27)(1)(c). The Court would then have to assess the reasonableness of the state’s programmes for meeting the section (28) requirements, and if these were found wanting, and further relief in the form of social assistance were denied, the reasonableness of the social assistance provided in terms of section (27)(1)(c).

Poor parents or caregivers of poor children are unlikely to be able to pursue these sources of relief without assistance. The likelihood is that when the test cases take place, they will do so with the backing of one of the NGOs who take it upon themselves to handle such matters. When the expanded public works programme (EPWP) is operating at full steam, and there is a sufficiently high level of take up of the child support grant (CSG), the state’s defence will almost certainly be that a reasonable programme of social assistance has been created. Except where the state is shown to have failed in its duty to ‘pay attention to crisis situations’ or to ‘prioritise the needs of the most desperate’, applicants to the Court for relief are going to have to show that the government programme in question is not reasonable, no easy task.

There is another route to access, namely through the concept of ‘minimum core obligations’. The progressive realisation clause was referred to, possibly unfairly, as a weasel clause, because of the ease with which the state could hide insufficient progress towards realisation of the rights contemplated in sections (27)(1)(a), (b) and (c) of the Constitution behind the ‘available resources’ qualification. The minimum core obligations condition closes this escape route.<sup>24</sup> Like the Convention on the

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<sup>23</sup> Rosa and Dutschke (2006, pp.19-20) point out that: “The State’s obligations towards children who live in the family environment were to provide the legal and administrative infrastructure necessary to ensure that children are afforded the protection encapsulated in section 28. This should be done by providing families with access to adequate housing and other socio-economic rights on a programmatic and coordinated basis. ”

<sup>24</sup> The progressive realisation clause, Rosa and Dutschke (2006, p.10) remind us, was not intended to be used as an escape clause, rather it “... reflects a realistic acceptance that lack of resources – financial

Rights of the Child, this provision has its origins in another international covenant, the International Covenant on Economic, Social and Cultural Rights (ICESCR). It offers, through General Comments issued by its supervisory body, the Committee on Economic, Social and Cultural Rights (CESCR), interpretations of the rights embodied in the Covenant. Discussing the minimum core, Rosa and Dutschke note that:

“The CESCR has stated that apart from the duty to realise a socio-economic right progressively, ‘a minimum core obligation to ensure the satisfaction of, at the very least, *minimum essential levels of each of the rights* is incumbent of every State party’ [*emphasis in original*]. The standard of a minimum core can be translated to mean that a minimum level of subsistence is necessary for a dignified human existence. What the minimum core consists of must be read from the ICESCR and the General Comments made in relation to the individual rights. The CESCR has delineated these minimum levels in relation to the right to adequate housing, the right to adequate food, the right to education, the right to the highest attainable standard of health and the right to water. The concept of a minimum core applies to both adults’ and children’s socio-economic rights.” (2006, pp.12-13)

Both the Constitution and the Children’s Act require the state to conform to the requirements of international instruments ‘binding’ on it. South Africa has ratified the UN Convention on the Rights of the Child, but has only signed International Covenant on Economic, Social and Cultural Rights. This means that the provisions of the latter are not binding, which means in turn, that South Africa’s obligations are limited to not taking steps “which defeat the object and purpose of the treaty” (Rosa and Dutschke, 2006, p.17). These authors are of the opinion, however, that in the light of South Africa’s commitment to international law, “that everyone should have the right to a minimum core of basic entitlements” (2006, p.26). An attempt was made to use the minimum core argument in the Grootboom case for the right of access to adequate housing. It was rejected by the Court on the grounds that:

“... there are practical difficulties with ascertaining the varying degree of needs in the country and that there is a lack of information on what these needs are.” (p.27)

The wheel has thus come the full circle—rights cannot be addressed, because needs cannot be determined.

Rosa and Dutschke (2006) commence their paper with an analysis of poverty among children. Yet a distressing feature of the precedents established by the Court thus far, in falling back on the provision that locates primary responsibility for meeting children’s rights on the parents, is an apparent underplaying of:

“... the fact that many parents are willing but financially unable to provide the standard of living that children have a right to in terms of the UNCRC and the AfCRWC.” (Rosa and Dutschke, 2006, p.23)

If children rights are to be honoured, the poverty of the households in which they live requires greater acknowledgement than the provision of child support grants and the remainder of the 'social wage'. In the absence of the right to decent paid employment, which no capitalist society offers, social assistance for adults, which many do offer, is the only reasonable alternative.

### ***What of the future?***

South Africa is committed to the modest goals of halving poverty and unemployment (poverty's major cause) by 2014. So large are the numbers of poor and unemployed that even if these goals are attained (which is unlikely), a very large number of people in both predicaments will remain (Meth, 2006a). Adult and child alike will see at least some of their rights going unfulfilled (their needs unmet), unless the state can be persuaded, through the Court, that the existing social protection system is inadequate, i.e., that the state has not taken reasonable steps to ensure that rights are progressively realised.

It is clear that for children's rights to be met, a minimum condition (necessary but not sufficient) is that their caregivers be raised out of the poverty which prevents millions of them from discharging their responsibilities. One of the problems to be faced in confronting the state over the 'reasonableness' of its programmes for addressing the needs of the poor, is the fact that no blueprint for a comprehensive social protection system exists. A great deal of energy and resources are going into the provision of the social wage (health, education, housing, electricity, water, sanitation and social grants for certain categories of beneficiary), but little attention is paid to income poverty, from whose importance government seeks to distract attention by repeated references to the advances it has made in the provision of the social wage (Meth, 2006b). Of late, extravagant claims about the success in reducing income poverty have been added to the state's armoury of weapons to deploy against critics (Meth, 2006c; 2006d).

With the exception of the extension of the child support grant, the recommendations of the Taylor Committee of Inquiry (2002) on comprehensive social assistance, in particular, the call for a basic income grant, have largely been ignored. Repeated references to a comprehensive social protection system are made by senior politicians, but the social assistance component of the system is never given any content. Slighting references to social assistance as the 'dole', and claims that 'our people want the dignity of work, not handouts' (true, but not relevant in the face of the manifest inability of the economy to provide jobs for all who need them), seem to be part of a softening-up campaign to prepare people for a stripped-down safety net-type approach to social protection for adults. The strong likelihood is that we will see government offer the expanded public works programme (EPWP) enlarged somewhat from its present size, as an alternative to social assistance for the working age population. It is in the nature of such programmes that the wage must be set so low that it will not entice informal economy workers, domestic workers and all of the other poorly-paid workers out of their existing employment. In other words, the principle of less eligibility, enunciated by the Royal Commission set up to look at the Poor Law in Britain in 1832, with all the horrors their recommendations entailed (Barr, 1998, pp.16-17), must apply. Those who refuse such work (as a substitute for

social assistance) will probably be deemed to have defined themselves to be not poor. Those who accept it, and there will be many who so with gratitude, will still be poor, but less than they are today.

The struggle for children's rights is inextricably bound up with the broader struggle for rights for all, and in particular, in the fight against poverty and unemployment (and the AIDS epidemic that exacerbates both). Until such time as the income security of the poor can be guaranteed, children's rights stand in danger of being trampled on.

Services long since identified as being urgently required have to be delivered to the children needing them. These are to be provided in a manner consistent with government's goal of making social services 'developmental'. Government is aware that to do so, a "holistic integrated policy framework" is necessary (Streak and Poggenpoel, 2005, p.16). There is, however, much that has to be done before the necessary structures come into being. Problems recognised long ago by the state as requiring an approach that integrates the activities of several departments (joined-up or holistic solutions in jargon-speak) fester on, for want of integration. In part, this is because it is impossible to define vulnerability rigorously, and to rank the threats to children's wellbeing in a consistent manner.<sup>25</sup> As a consequence, the various forms that vulnerability takes, appear, to an outsider like myself, to be addressed in an *ad hoc* fashion.

A starting point for analysis of how well or otherwise government is doing in its attempts to assist with meeting children's needs is with the budgets of the various spheres of government. So, apart from the need to fight for truly comprehensive social protection, there is also a strong imperative to render the process by which funds are allocated to the various aspects of child protection, more transparent.

In his address to the National Assembly on the tabling of the 2006 Medium Term Budget Policy statement on 25<sup>th</sup> October 2006, the Minister of Finance announced, no doubt proudly, and not unreasonably so, that South Africa had been ranked fourth out of 59 countries for the transparency of the budget documents, by a coalition of international NGOs under the umbrella of the International Budget Project.

One would not wish to take any of the shine off this achievement, but as the Minister admitted himself, "there is still too little debate in this House and in the country on budget priorities." If regard is had for the parlous state of affairs as far as budgeting for children is concerned, then the performance of some of the 55 countries behind South Africa in the ranking referred to above must be pretty dire. A sombre analysis of the budget process in South Africa as it affects children (which casts little light on how actual allocations are derived) was unable to answer a number of vital questions on expenditure to meet children's rights (Streak and Poggenpoel, 2005). According to these authors it proved to be impossible to:

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<sup>25</sup> The rudiments of a ranking structure are visible in the pyramid depicting four levels of social services; continuum of care; statutory services; early intervention and finally, prevention, and the stress laid on the need to shift away from a concentration of resources in care, towards prevention. This does not, however, identify specific threats to children's wellbeing (Streak and Poggenpoel, 2005, p.17).

“... identify child-specific spending on social welfare services” or “to shed any light on the size of the funding gap that exists in government’s budgeting for social welfare services” (p.42).

To understand children’s wellbeing, it is necessary to go beyond what is spent directly on them, to the indirect expenditures that go to improve their lives. In short, if policy towards children is to be evidence-based rather than instinctual, there is a great deal of work to be done.

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