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A Developing Dialogue – Children’s Rights, Children’s Law and Economics: Surveying Experiences from Southern and Eastern African Law Reform Processes¹

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1. Introduction

Law reform in southern and eastern African countries to domesticate the UN Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), to synthesize common, civil and customary laws, and to modernise and codify a myriad of outdated statutes affecting children that were inherited from the colonial era has been an ongoing project in numerous states in the region since the first comprehensive Children’s Act, that of Uganda, in 1996. These law reform processes are, in many instances, still ongoing.

In South Africa, the establishment of a project committee of the South African Law Reform Commission (SALRC) to investigate proposals for a comprehensive Children’s Act dates back to 1997. At the time of writing, the Children’s Act 38 of 2005 has been passed by Parliament and partially promulgated (on 1 July 2007). This statutory compilation represents those chapters of the complete package originally proposed by the SALRC affecting national competencies (courts, adoption, parental rights and responsibilities, international child abduction and so forth). All the provisions affecting the concurrent provincial spheres of competence, and hence implicating provincial budget expenditure, were dealt with and passed in a separate Parliamentary process² in the Children’s Act Amendment Act 41 of 2007, signed by the State President on 14 March 2008 after being concluded in Parliament in November 2007. Draft regulations and forms accompanying the Act and its provincial counterpart had been developed whilst the Amendment Act was still being debated in Parliament; these were published in the Government Gazette for public comment on 27 June 2008, and are now being finalized. The conclusion of the process of regulation drafting will then permit the remainder of the composite Children’s Act with all of its constituent elements to be put into operation (probably only in 2009, though there is still talk that this might be effected in November 2008).

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¹ Paper prepared for the International Society of Family Law Conference, Vienna, Austria, September 2008.

² This is required by the Constitution of the Republic of South Africa, sections 75 and 76.

This will bring to an end an admittedly lengthy process that has spanned more than a decade since the project committee of the SALRC was appointed to undertake a review of the existing Child Care Act; the fruits, though, are a legislative package that is probably the most bulky statute currently on the South African statute book. In addition to this, a dedicated Child Justice Bill governing the proposed establishment of separate juvenile justice system for children in conflict with the law has very recently been finalised after a lengthy gestation, also, of more than 10 years since the proposals were first mooted.³

In Malawi, the 2006 Children (Protection and Welfare Bill) awaits debate in Parliament, having been developed by a specially mandated Committee of the Malawi Law Reform Commission. The Bill is currently being reorganised to reflect child rights, child protection and juvenile justice provisions in separate chapters. It will probably not be introduced to Parliament before the elections that are to take place in the first part of 2009.⁴ Ultimately, though, this will be a comprehensive statute covering both children in need of care and protection, and children in conflict with the law. A similar situation prevails in Lesotho, although it has been lamented that the Bill developed consultatively by a special project committee of the Lesotho Law Reform Commission in 2006 is taking an inordinately long time to traverse the administrative steps still required before being tabled in Parliament.⁵

Namibia is, according to my assessment, dealing with aspects of the reform of children's law in discrete stages. The Children's Status Act dealing with many aspects of affiliation of children, of inheritance rights (particularly of orphaned children), and care and guardianship of children was passed in 2006 (Act 6 of 2006), and awaits promulgation once the regulations are finalised. A Child Care and Protection Bill for this country, first aired in the mid - 1990s, is going to be subjected to country wide consultation and refinement in the coming few months. The draft Child Justice legislation of Namibia, modelled on the initial South Africa proposals, will presumably follow upon this. Both Botswana and Swaziland have moved some way towards the process of drafting comprehensive children's law,⁶ and in Mozambique, two statutes have been developed to conclude a fairly extensive law reform review.⁷ The Kenyan Children's Act, 2001, in force from 2002,⁸ is evidently being reviewed for amendments to strengthen provisions for children in alternative care, adoption, and

³ A Project Committee on Juvenile Justice of the SALRC was established in late 1996, and it produced a draft Bill for the first time in 1998, which was concretized in the *Report on Juvenile Justice* of 2000. This resulted in a Bill being tabled, the Child Justice Bill 49 of 2002, which was debated in parliament in 2003. Thereafter, the Bill lay dormant until December 2007, when a revised version was produced. This was again the subject of intense Parliamentary debate throughout the first half of 2008, finally being voted upon in the National Assembly on 26th June 2008. It is currently before the second house of Parliament for adoption, and once passed, will have a promulgation date of 1 April 2010. The intervening extended period is intended to give various government departments charged with implementation sufficient time to plan, set up the required structures, and recruit sufficient staff.

⁴ Personal communication, UNICEF child protection officer, Malawi, 10/9/2008.

⁵ Kimane, I 'The Lesotho Child Care and Protection Bill: why the delay?' in Sloth-Nielsen, J and Du Toit, Z 'Trials and Tribulations, Trends and Triumphs: Developments in child and family law' (2008 forthcoming), Juta and Co, Cape Town.

⁶ Tabengwa, M in Sloth-Nielsen, J and Du Toit, Z, note 5 above (2008 forthcoming); Gallinetti, J 'Harmonisation of laws in Eastern and Southern Africa: 'Swaziland' country study unpublished, African Child Policy Forum, 2006, and personal communication, Gallinetti, J, consultant to the Attorney General's Office, Swaziland on the development of the Children's Act, September 2008.

⁷ Sloth-Nielsen, J and Gallinetti, J 'Review of children's law in Mozambique' Government of the Republic of Mozambique: Utriel and Mmcas and Unicef, 2004.

⁸ See Odongo, G (2005) 'The Kenyan Children's Act' 12 *Int Jnl of Children's Rights* 419-430.

diversion for children in conflict with the law.⁹ Madagascar has recently enacted a raft of relevant statutes, including laws relating to adoption and fostering of abandoned or orphaned children.¹⁰

Zambia has a draft statute which comprehensively deals with children's law in the modern era,¹¹ and many of these initiatives and ongoing developments were captured in a process which entailed the writing of country specific research reports, followed by a comparative and composite report released by the African Child Policy Forum in 2007.¹²

This paper deals to a limited extent, if at all, with the *contents* of the outcomes of these law reform efforts (the extent to which they enshrine the best interest of the child standard, provide for care and protection, deal with guardianship and the incidentals of parenthood, or regulate adoption and inter-country adoption). The contents of the statutes or proposed statutes have been dealt with, both individually and in comparative context, in a few recent publications, as noted above, although much more remains to be explored. For instance, comparative analysis can attempt to establish the extent to which the law reform initiatives ultimately do succeed in harmonising domestic law with the provisions of the CRC and the ACRWC,¹³ and can illustrate the manner in which African cultural perceptions have been accommodated in the new children's legal frameworks,¹⁴ to cite two fruitful areas of future research. However, this article is more centrally concerned with aspects of the processes of the respective legal developments, and their broader political consequences - for children generally, as well as for individual children, focussing on the terrain of economics and fiscal allocation.

In illuminating the economic dimensions, some care must be taken to distinguish South African developments from those elsewhere in the region, at least until very recently, because of her relative economic wealth seen in regional context. Hence, South Africa's social security system, which, although it is not a comprehensive cradle-to-grave scheme, nevertheless includes an array of child related grants as well as a near universal, state-funded old age pension system.¹⁵ Until recently South Africa was the only country in the region with what could in international terms be described as a social security system for categories of indigent or vulnerable groups, including children. Upwards of 10 million beneficiaries of state grants – 25% of the population – currently receive non-contributory cash transfers on a monthly basis, which tends to place South Africa on a slightly different footing to her neighbours. For this reason, I will first explore the economic dimensions of the South African Children's Act. Thereafter, I will review some developments on the regional level more

⁹ A Hussein, keynote address at the first African conference on child sexual abuse, hosted by ANPPCAN, Kenya, 24-26th September 2007.

¹⁰ African Child Policy Forum (2007) 'Harmonisation of laws in Eastern and Southern Africa: good practice' available at www.africanchildforum.org.

¹¹ Ng'ambi, DN 'Harmonisation of national and international laws to protect children's rights: the Zambia case study' prepared for the African Child Policy Forum Roundtable on Harmonisation of Laws for Children in Eastern and Southern Africa, Nairobi, October 2006 (copy on file with the author).

¹² See 'In their best interests? Harmonisation of laws for the protection of children's rights in Southern and Eastern Africa' (2007) available at www.africanchildforum.org.

¹³ In this regard, it can be pointed out the progressive proposals sometimes falter in parliamentary processes. Kenya's election to retain 8 as the minimum age for criminal capacity and the excision from South Africa's Children's Act and its accompanying Amendment Act of a proposed provision to outlaw parental corporal punishment are two examples in point.

¹⁴ For instance, providing for children's duties in accordance with article 31 of the ACRWC.

¹⁵ The old age pension is payable provided that the means test is not exceeded.

broadly. Conclusions related to the economic dimensions of child law reform will be drawn, whereafter some observations and exploration of the interrelationship between law and development, and its potential impact for children, will be proffered.

2. South Africa and the Economic Dimensions of Child Law Reform

2.1 Pie in the sky and beyond

Right at the outset of the South African Children's Act law reform process, a consciousness of the economic dimensions of what lay ahead was evident. Hence, at a conference addressed by the then project leader of the Project Committee shortly after this committee was appointed, the following statements were recorded:¹⁶

...we have alluded to the budgetary implications attached to the process of law writing upon which this committee has embarked. In an ideal world, law reform would be shaped by a concern for matters of principle, the bedrock of precedent, a desire for internal jurisprudential consistency, adherence to constitutional and international standards and an academic engagement with the niceties of one or other legal solution. Then, having exercised the necessary choices, the law reformers would be able to step aside, leaving matters of implementation and resourcing to the executive...

The Law Commission project committee tasked with developing the new Children's Statute has been forced to confront the reality that this law reform process is not exclusively, or even primarily, a **legal** endeavour; on the contrary it is a performance that must be played out on a much larger stage. It would appear that the 'words on paper' are in reality of far less import than the political and economic strategies adopted during the drafting process (emphasis in original).

These reflections illustrate that the drafters approach was to be that the intended statute would be of far greater reach than merely a regulatory framework elucidating rights, responsibilities and respective roles of parents, family members, communities and the state: in conception, this new law was intended to be transformative of both social *and* economic relationships. In a country such as South Africa, with a past predicated on social and economic divisions deeply entrenched by racial categorisation, the new children's statute was conceived to be one tool by which to further economic equality and, at the same time, empowerment of the poor and vulnerable. And in this regard, as is the case in the remainder of Africa, it is worth pointing out that children comprise approximately 50%+ of the population, and that the majority of children officially live in conditions of poverty: Statistics South Africa surveys show that more than two-fifths of South Africa's children live in a household where neither parent is employed; two-thirds of all children live in poverty; and over half of all children live in households with a monthly income of R800 (USD 100) or less. In short, South Africa's children are bearing a large part of the burden of poverty.¹⁷

¹⁶ Sloth-Nielsen, J and van Heerden, B 'The Political Economy of Child Law Reform: Pie in the Sky?' in Davel, CJ (ed) *Children's rights in a Transitional Society*, Protea Book House, 1998, p120. See, too, 'Choices which can affect the cost of the children's bill' Pamphlet by Budlender, D, Proudlock, P and Jamieson, L, Centre for Actuarial Research and Children's Institute, University of Cape Town, July 2007.

¹⁷ 'Choices which can affect the cost of the children's bill' (note 16 above).

The vision for economic betterment in the quest for improved delivery of child rights services continued to find expression in the first public documents released by the South African Law Reform Commission's Project Committee, namely the 1998 Issue paper,¹⁸ and the 2000 Discussion Paper on the Review of the Child Care Act and the final Report.¹⁹ So, in the chapter dealing with the linkages between the state social security system and the intended scope of legislative endeavour of the proposed law reform process, the following was said:

Even before the release of Issue Paper 13, it was clear that a range of intersecting areas of law would have to be addressed in this investigation. There has been an overall perception that spending on social welfare services (as opposed to direct transfer payments in the form of grants and pensions) has diminished in the period since 1996, and financial strains experienced by the non-governmental welfare sector have been widely reported. Thus, a range of intersecting economic issues were explicitly identified as part of the challenge of child law reform.

Stating further that the alternative care system is inextricably intertwined with available subsidies and grants, the SALRC pointed to its awareness from the outset of the financial implications of the investigation, and of the important policy options that often fall to be decided based on affordability rather than principle or practicality. In the executive summary preceding the Report on the Review of the Child Care Act, the final document emanating from the SALRC at the conclusion of the drafting and consultation process, which Report also contained its legislative proposals in the form of a draft bill, the statement was made that²⁰

In the consultation processes, it was repeatedly stated that any proposals made for law reform must be accompanied and supported by the necessary human and financial resources. A difficulty faced by the Commission was whether to make recommendations within the current resource framework which all accept to be wholly inadequate, even for present purposes, or to make proposals in the belief that additional resources simply will have to be found. In the end the Commission decided on a pragmatic approach where it attempted to strike a balance between the available current resources, their optimal use and application, and the realisation that social welfare and other services for children in South Africa will continue to need massive injections of resources in the foreseeable future in order to fulfil the basic needs of the most vulnerable members of our society.

It can be concluded that the law reform process was imbued with an economic imperative that was identified from the outset. The next question that arises is how these good intentions were (or were not) translated into concrete law reform proposals.

2.2 Grants

At the time that the drafting of the new children's law commenced, the state social security system referred to above was in a state of flux. Apartheid era grants payable predominantly to privileged sectors of society for the maintenance of children were being phased out, as the fiscal implications of their extension to all qualifying beneficiaries in the country, irrespective

¹⁸ SALRC *Issue Paper on the Review of the Child Care Act*, 1998.

¹⁹ SALRC *Discussion Paper on the Review of the Child Care Act*, Par 25.1, quoting Sloth-Nielsen and Van Heerden (note 16 above).

²⁰ SALRC *Report on the Review of the Child Care Act* (executive summary).

of race or geographical location, were stark: simply put, increased and equitable access to the so-called state maintenance grant on the basis of non-discrimination would bankrupt the country. A new grant, payable to the primary caregiver of a child in a much lower amount, was proposed and introduced (the child support grant, or CSG). It was means tested and initially payable in a very low sum of money (R100 or 15USD per month) to children aged below 7 years. After the turn of the millennium, this ceiling was progressively lifted as revenue receipts enabled a positive response from Treasury, and currently the grant is payable (at slightly more than double the initial amount) to children aged below 15 years. As at January 2008, 8.1 million children were registered as beneficiaries of the CSG.²¹ There is considerable support for the idea of targeting all vulnerable children aged below 18, and some expectation that this might happen, as indicated in the 2007 Budget speech of the Minister of Finance.²²

A Commission of Inquiry, the Taylor Committee,²³ had been tasked with reviewing those aspects of the maintenance of children related to social assistance in 1997. The Committee had some interaction with the law reformers working on the review of the Child Care Act, but the final Report on the Review of the Child Care Act of 2002 records that greater interaction might have been desirable.²⁴ This was in view of the fact that both the 2000 Discussion Paper and the final Report of 2002 contained a dedicated chapter on grants applicable to children, both focussing quite pertinently on state liability towards the support of children deprived of a family environment, such as children in foster care, children in institutional care, and orphans and abandoned children, who might also be those available for adoption. In the SALRC's view, as is evident from the quotation in the preceding section, financial support was integral to the determination of alternative care arrangements, and much evidence was placed in the SALRC Report of the escalating placement of children in foster care, allegedly so that foster parents could benefit from the much larger foster care grant payable at the time than was payable under the newly instituted CSG.

Recent data gives the following overall impression of current foster care practice:

- 91% of foster placements are with extended family members (e.g. grannies and aunts).
- In 48% of cases, both parents of the child are deceased – so the arrangement is clearly a long term and permanent placement, rather than emergency safe care.
- In 80% of cases, one parent is deceased.
- Only 6.3% of foster care matters involve incidents of maltreatment of children or of inadequate parenting.
- 9.7% of cases only involve abandoned children being placed in foster care.²⁵

²¹ South African Child Gauge 2007-8, Children's Institute, University of Cape Town.

²² Sloth- Nielsen, J et al 'Report on child friendly laws in African context– good and promising indicators and practices' (report submitted to the African Child Policy Forum, December 2007 (unpublished).

²³ The Taylor Committee of Inquiry into the State Maintenance System, Department of Social Development, 1998.

²⁴ The Taylor Committee delivered a final report also in 2002; the two processes were obviously working in parallel with each other.

²⁵ Datadesk, Stellenbosch University/ Geospace International, *A Profile of Social Security Beneficiaries in South Africa*, 2006 quoted in National Welfare, Social Service and Development Forum, *Discussion Paper: Use of the Statutory Foster Care System to Support Long-Term Kinship Care: Impact on the Social Welfare System and the Social Work Profession*, 2008, p 2.

It is no secret that the foster care ‘demand’ is driven by two factors: the availability of a social grant in a (for South Africa) not insignificant amount (around 80USD per child per month), and a rising number of children without parental care due to HIV/Aids. Because of the availability of the monetary foster care grant, many *de facto* informal care situations have been converted into formal foster care arrangements. And, as has been well documented in recent times, the state response to rising orphanhood has, since the turn of the millennium, been driving towards absorption of children in foster care, fuelled by the availability of the grant.²⁶

The number of foster care grants payable has escalated in recent times. In May 2000 there were less than 50 000 children in court-ordered foster care. By May 2007 the number had reached 418 608. This means an increase of more than 700% in seven years, and long waiting lists for social work services and court dates.²⁷

The concern of the SALRC about the possibly less-than-optimal interaction between the Taylor Committee of Inquiry into social security and the law drafting process articulated in the final Report on the Review of the Child Care Act is, in retrospect, of no consequence. There are three reasons for this assertion: first, the SALRC proposals about linking grants to forms of child care provided for in law, and providing for ‘children’ related grants in the principal Children’s Act was not accepted by Cabinet, and references to social grants that had been put forward were excised altogether from the Bill that was tabled in Parliament in 2003. The opportunity to dis-incentivise certain forms of alternative care – e.g. situations in which informal foster care is converted to a *de facto* placement requiring extensive state intervention²⁸ purely to access money, or incentivising others – e.g. linking adoption, a permanent solution to the placement of children without parental care – to a new grant, was on the face of it lost. Second, a new comprehensive social security statute was under development – for constitutional reasons – and along with it a new statutory payment agency, the South African Social Security Agency (SASSA), the legislative basis for which was laid in 2004. This effectively negated the possibility of divorcing *children’s* statutory social security from the larger social security paraphernalia: practicalities and administrative efficiency militated against this. Third, the emergence of a national government policy trend to deal with HIV/Aids orphans by dramatically expanding the foster care system, as mentioned above, has overshadowed rational examination of the suitability and sustainability of formal foster care placements as the preferred policy response to orphanhood.

The situation remains that the CSG payable to a primary caregiver is only one third of the amount payable to a foster parent, which has resulted in the prevailing alternative care system for children being labelled a poverty alleviation programme. There are obvious consequences for the availability of resources – human and fiscal – for child protection, as the weight of the

²⁶ See *Home Truths* Children’s Institute, University of Cape Town, 2006; Barberton, C et al (2006) *The Cost of the Children’s Bill: Estimates of the cost to government of the services envisaged by the comprehensive Children’s Bill for the period 2005 to 2010*. Cape Town: Cornerstone Economic Research; Sloth-Nielsen ‘The Child’s Right to Social Services, the Right to Social Security and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*’, *South African Journal on Human Rights*, Vol. 17, Part 2, 2001, p 210 - 231.

²⁷ ‘Choices which can affect the cost of the children’s bill’ (note 16 above).

²⁸ Foster care can only be ordered by a children’s court, upon the basis of the report of a social worker recommending this. Foster care placements must be monitored and reported upon on a regular basis. The order of the children’s court lasts for a maximum of two years, after which it must be renewed, although this can be done administratively under the existing Child Care Act 73 of 1983, without a further court intervention.

social services system has increasingly fallen on formalising existing kinship placements for the purposes of securing a state grant. The Taylor Committee's Report has been overtaken by events, in other words.

But although grants are not provided for in the Children's Act *eo nomine*, the background sketched above has centrally driven aspects of the Children's Amendment Act, in particular the way in which the Act provides for foster care placements. The underlying premise is that most foster care placements are not emergency and temporary placements. Hence, for most placements intensive supervision, ongoing review of placements and interminable reports simply eat into resources (social workers time, court time etc) which could better be devoted to prevention work or child protection services.

Thus, new provisions permit the conversion of foster care into a long term placement which will subsist until the child becomes a major at 18 years.²⁹ The Act also provides for a new form of foster care, called cluster foster care, giving legislative effect to the prevailing policy concerning a community – like form of response to children affected by HIV/Aids. Cluster foster care is a form of massification of foster care, whilst at the same time avoiding institutionalisation and capitalising on the existing foster care grant to incentivise potential care-givers. The precise contours of cluster foster care³⁰ are not particularly well set out in the Act, and it remains contentious: the process of defining how cluster foster care will work has been left for the regulations to spell out in more detail, but the experience in drafting the regulations thus far³¹ has indicated that fiscal issues – who controls the foster care grant - are of core concern, rather than any underlying legal relationship between the cluster foster care scheme and its participating members.³²

2.3 Costing

The SALRCs first experience with costing of legislation occurred with preliminary costings undertaken by private consulting economists in the development of reform proposals relating to the Child Justice Bill dealing with the establishment of a separate juvenile justice system.³³ Funded by private donor funding, this initial foray presented a unique opportunity to explore the 'how' of costing legal provisions, and essentially involved attaching costs to each of the processes/stages described in the draft Bill that was then under discussion: so, starting from

²⁹ Section 186(1) provides for two scenarios: first, where a child has been placed with a person other than a family member for more than two years, and having considered the need for stability in the child's life, a court [the children's court which bears responsibility for foster care orders] may order that no further social worker supervision is required for that placement, that no further reports are required and that the placement will subsist until the child turns 18. Second, where a child has been in foster care with a family member for more than 2 years, the court may extend the order until the child turns 18 after considering the need for stability in the child's life where the child has been abandoned by biological parents, where they are deceased, or where there is for whatever reason no purpose in attempting re-unification services. Section 186(3) provides that despite these provisions, a social services professional must visit the child at least once every two years to monitor and evaluate the placement.

³⁰ Defined in section one rather vaguely as 'a scheme providing for the reception of children in foster care, managed by a non-profit organisation and registered by the provincial head of social development'.

³¹ The author of this article was awarded the contract by Government to draft the regulations to the Children's Act, and personally drafted the regulations on foster care and cluster foster care.

³² The tensions are multitudinous: should schemes be allowed to employ salaried foster carers? Or should the care provided be a purely voluntary endeavour on the part of the carers? If the grant is payable to the scheme, is there not a risk that a percentage will be siphoned off for the management and functioning of the scheme, thereby diluting what meagre resources are available to children? These questions remain unanswered.

³³ Barberton, C (with Stuart, J) 'Costing the implementation of the Child Justice Bill: A scenario analysis' *Research Monograph Series Applied Fiscal Research Centre, University of Cape Town, 1999.*

the time of arrest and based on estimates of the number of children likely to be in contact with the law, hence involving such processes as the police costs in transporting children between courts and facilities for their temporary detention, staff costs associated with the new proposed assessment phase and the preliminary inquiry procedure and with the proposed statutory base for assessment of children by probation officers. The intention was less to establish the actual figures that would be involved, than to use the costing as a lobbying and advocacy tool to support the passage of legislation in Parliament.³⁴

The Child Justice Bill was subjected to further costing (updated) once it was tabled in 2002.³⁵ At that stage, it was expected that the Bill would be completed within a fairly contained period of time. The second costing was also intended to constitute a kind of implementation plan: a blueprint for implementing government departments to enable them to plan (in their 5 year, medium term expenditure budgets), and thereafter to bid for treasury allocations.

As I have previously noted elsewhere, the mere existence of this pending Bill coupled with well-grounded and quantified estimates of required expenditure, had the effect of releasing funds for development – even though the Bill took another 5 years to re-appear in Parliament.³⁶ When the Child Justice Bill did re-emerge in early 2008, the effects of the costing and its aftermath were dramatic: many more children were by this stage accommodated outside of prisons while awaiting trial in welfare facilities than had been built in the intervening period, and prospects existed for further improvements to ensure adherence to the principle that detention be a last resort. Social service provision to children, both before appearance in court during assessment and in the provision of pre-sentence reports and diversion programmes, had grown in reach due to the creation and filling of many new posts within the provinces. This was important: ultimately Parliament had to be convinced that Government was able to deliver on the system prescribed in the envisaged bill before they were prepared to pass the legislation. Hence the costing contributed directly to finalisation of the Bill.

The benefits of the costing processes undertaken in relation to the Child Justice Bill were not lost on the Project Committee on the Review of the Child Care Act, which in any event (intentionally) had members in common. Thus in the introduction to the final Report on the Review of the Child Care Act, in a section headed ‘The way forward’, the SALRC said the following:³⁷

Should the Minister decide to proceed and introduce the legislation, a critical fourth step would be to cost the draft legislation. As stated in the Background section above, the Commission adopted a pragmatic approach where it attempted to strike a balance between the available current resources, their optimal use and application, and the realisation that social welfare and other services for children in South Africa will continue to need massive injections of resources in the foreseeable future. Thus, there is an urgent need to determine what it would cost to implement the new legislation. However, the challenges surrounding such a costing exercise are compounded by the

³⁴ Sloth-Nielsen, J ‘The business of child justice’ in Burchell, J (ed) *Criminal Justice in the new South Africa* Juta and Co, Cape Town, 2003.

³⁵ Inter-sectoral committee for Child Justice *Child Justice Bill Budget and Implementation plan*’ Departments of Justice and Constitutional Development, Pretoria 2002.

³⁶ Sloth-Nielsen, J ‘A short history of time: charting the contribution of social development to the development of juvenile justice 1996-2006’ 2007 *Social Work/Maatskaplike Werk* 419.

³⁷ SALRC *Report on the Review of the Child Care Act*, chapter 1: Introduction.

lack of information as to what the existing system costs and what it would cost, not only in rands and cents, but also in human potential, if the current system is not radically improved. Ideally the costing exercise should form part of the consultations at government level. Determining the financial implications (to the State) of the proposed legislation is a precondition for obtaining Cabinet approval to introduce the draft legislation in Parliament ... Proper (financial) planning will also ensure smooth implementation of the legislation once adopted by Parliament.

So the costing of the Children's Bill was commissioned, a mammoth undertaking, since, as the quote above insinuates, there was no baseline cost for the provision of social welfare services from which to begin investigating what new provisions might entail. For instance, a broad estimate could be made of the numbers of arrested children derived from various sets of criminal justice data. But how does one quantify the numbers of children likely to need an extended and more comprehensive array of social work services, including, for the first time, prevention and early intervention services, services to partial care facilities, cluster foster care schemes and so forth? The process of setting up a baseline involved, in probably tremendously overly simplified terms, two variables: estimates of numbers and of time, and then matching those to costs, largely of the human resource kind.

Hence: how many children are likely to need social welfare services because a report of abuse and neglect has been received? (the level of demand); how long will it take to investigate, report, and follow up these reports? (no of minutes/hours multiplied by estimated no of reports or follow up visits to get total staff member time required); what level of staff member will perform this task? (professional/auxiliary earning x per month), multiplied to get a crude cost of the service concerned: e.g. mediation services to resolve disputes between unmarried parents about parental responsibilities in respect of their biological child, or child protection services to abused and neglected children.³⁸

The Cornerstone Economic Research costing revealed that *existing* government budgets covered only 25% of the services set out in the current Child Care Act, which the Children's Act, when promulgated in full, will replace. Yet the Child Care Act is currently the law of the land. So even before the new Children's Act comes into effect, the government is not meeting its legal obligations under the old Child Care Act.³⁹ Further, the costing research identified differences in existing expenditure between provinces. For example, in the Western Cape the costing found that the 2005/06 budget covered 34% of services required by the Child Care Act, compared to only 10% in Limpopo. Average spending per child in the Western Cape was 7.5 times as high as spending in Limpopo despite the fact that both provinces fall under the same legislation.

The costing team considered four different scenarios. The four scenarios, starting from the lowest and ending with the highest total cost, are the Implementation Plan (IP) low scenario; the Implementation Plan (IP) high scenario; the Full Cost (FC) low scenario; and the Full Cost (FC) high scenario.⁴⁰ For the FC scenarios, the costing team used other evidence to

³⁸ See, generally, Barberton, note 26 above.

³⁹ Barberton, note 26 above. See further Budlender, D and Proudlock, P 'Analysis of the 2008/09 Budgets of the 9 provincial departments of Social Development: Are the budgets adequate to implement the Children's Act?' Children's Institute, University of Cape Town, July 2008.

⁴⁰ See for a more detailed description of the methodology also Innocenti Research Centre 'Reforming Child Law in South Africa: Budgeting and Implementation Planning' (2007) available at www.irc-unicef.org

estimate how many children actually need services. The FC scenarios are intended to provide for equitable distribution of social welfare services and facilities rather than continuing with existing inequitable patterns. The high and low scenarios reflect different levels of quality of service delivery. The high scenario costs 'good practice' standards for all services. The low scenario uses 'good practice' standards for services classified by the costing team as priority, but lower standards for services classified by the costing team as non-priority. The costing report identified that, besides lack of budget, that are currently other significant obstacles impeding the delivery of quality social protection services to ensure that children are well cared for. These problems include the discovery that we have a dearth of qualified few social workers in the country, fewer than 10 000 with an estimated short fall of 50 000 professionals! Analysis of graduation figures revealed that too few new social workers are being trained. Poor collaboration was identified as another obstacle: Different parts of the government are not working together optimally, leading to professional time being wasted. For example, courts waste a lot of time waiting for reports from social workers, while social workers waste a lot of time waiting in courts for children's cases to be heard. Services are often not provided in the most cost-effective way.

Three observations conclude this section: first, the South African costing experience has been benchmarked as groundbreaking at the international level: a recent UNICEF publication is testament to this.⁴¹ The methodology followed illustrates that child law reform, particularly in a developing country, should not only be assessed in the context of what is available in terms of resources, but that it can be a planning tool for the future, and can identify what resources government needs to put in place to deliver on its legal mandate. Last, the government has been galvanised into action regarding the scarcity of social workers. Bursary programmes have been put in place, salaries increased consequent upon the drain of social workers to other countries in pursuit of higher pay, and social work declared a scarce skill for the purposes of salary enhancement. Thus the costing has lead directly to a high level commitment to increase the pool of social workers in order to be able to implement the Act. Whether this initial drive to increase the human resources available to render the services will continue remains to be seen.

2.4 Section 4 of the Children's Act and miscellaneous other relevant provisions

The NGO community which supported the lengthy passage of the Children's Act in Parliament has hailed the inclusion of section 4(2), to be found in the general principles at the outset of the Act, as a major victory. This section reads as follows:⁴²

Recognising that competing social and economic needs exist, organs of state in the national provincial and where applicable, local spheres of government must, in the implementation of this Act, *take reasonable measures to the maximum extent of their available resources* to achieve the realisation of the object of this Act (emphasis added).

⁴¹ 'Reforming Child Law in South Africa' note 40 above.

⁴² Skelton and Proudlock note that this wording echoes the wording of article 4 of the CRC. Citing Thomas Hammarberg ('Children' in A Eide, C Krause, A Rosas (eds) *Economic Social and Cultural Rights*), they agree that this should be understood as a call for prioritisation of children within state budgets (Skelton, A and Proudlock, P 'Interpretation, objects, application and implementation of the Children's Act' in Skelton, A and Davel, CJ *A Commentary on the Children's Act* Juta and Co, Cape Town, 2007). Section 4 came into force on 1 July 2007.

Borrowing from the Constitutional Court language in the now-famous *Grootboom*⁴³ decision concerning the nature of the state obligation in relation to the fulfilment of socio-economic rights, this section does not require that priority be accorded the financing of services required under this law to the exclusion of all else, but it does place a clear obligation upon duty-bearing government departments to do undertake specific actions, as reflected by the emphasis above: first, the phrase ‘reasonable measures’ implies a conscious process of determining what resources are required to give effect to the provisions of the Act for children requiring the services contemplated by it, and second, to ensure that in overall budgetary allocations, the need for these services is accorded priority.⁴⁴ Third, this process is a continuing one of resource allocation that must occur in increasing amounts over time: budget cuts or diminished allocations would be regarded as a retrogressive measure which could be challenged as inconsistent with the wording of the Act.

Further, clear and compulsory provisioning clauses in the Children's Amendment Act give provincial heads of Social Development Departments greater bargaining power to capture a larger slice of the provincial budgets for social welfare services in their annual bids to the National Treasury.⁴⁵ These amendments to place a duty on the Provincial Head to provide *and fund* certain services occurred during the final stages of the Parliamentary process, in the National Council of Provinces, the second chamber of Parliament, and constitutes an important step forward. The services for which a statutory funding obligation has been included are child protection services (s 105(1)), prevention and early intervention programmes (s 146(1)), and child and youth care centres, the new generic term for all residential care placements of children (see s 193).

There remains the issue that in several focus areas of the new Act, the obligation to provide funding is discretionary. The words ‘may provide’ instead of ‘must provide’ are used for four service areas, namely for partial care facilities (s 78), for early childhood development programmes (s 93), and for a new category of assistive facilities for children, called drop-in centres (s 215). It is arguable that the discretion could result in these services not being funded at all, or being funded inadequately.

Nevertheless, the strong basis for litigation which has been laid through the justiciability of constitutional socio-economic rights in South Africa applies equally to the funding imperative enshrined in the sections of the Children's Act enumerated above: if government does not show that it has planned for resource allocation to the extent contemplated, it can be held to account. Centrally, the Children's Act has its foundation in the constitutional protection of children from abuse, neglect, exploitation and maltreatment.⁴⁶ The State will, according to existing jurisprudence, not be able to escape liability for failure to fulfil what is also a constitutional duty, and may be called on to justify non- or slow implementation, or

⁴³ *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

⁴⁴ For a simple explanation of how the national and provincial budget process work in the context of social spending on children, see Budlender D, ‘Budget Allocations for implementing the Children's Act in South African’ *Child Gauge* 2007-8, note 21 above.

⁴⁵ See in this regard section 35 of the Public Finance Management Act 1 of 1999 which requires that ‘[d]raft national legislation that assigns an additional function or power to... a provincial government must, in a memorandum that must be introduced in Parliament with that legislation, give a projection of the financial implications of that function, power, or obligation to the province’.

⁴⁶ Section 28(1)(c) of the Constitution, read with section 28(1)(c), insofar as the latter section includes a reference to the child's rights to social services.

unreasonable allocation of resources, in respect of the Act's provisions.⁴⁷ However, this possibility should not be seen only as a 'stick' with which to beat government in future: rather, it serves to send a strong, albeit enforceable, message to government to plan for, and fund, services to enable the optimum implementation of the Act.

3. African Developments

The South African experiences linking child law reform to fiscal issues have not gone unnoticed in the region. This is in no small part to the regional co-operation that has been fostered through various study visits, conferences, and sharing of experiences amongst those involved in law reform processes. So, too, South Africa's rapid and wide-scale roll out of the CSG has been identified as a 'good practice' in the development community more broadly, and now forms the basis of a model which is being experimented with elsewhere, even if this is not yet enshrined in legislation. A brief overview of some relevant developments is therefore provided next.

3.1 Grants (social cash transfers)

Since the very late 1990s, the international community has begun to support programmes giving effect to children's right of access to social security as a preventive strategy to provide a minimum floor of protection against poverty, often also as a frontline response to HIV/Aids. There have been positive evaluations of the spin off effects of cash transfers or small grants in relieving the worst effects of poverty, and, especially where economic growth has been positive, African governments have been encouraged to support schemes that were initially donor funded.⁴⁸ The cash transfer system is depicted as primarily reducing the vulnerability of children: At a conference in Addis Ababa in May 2008, it was pointed out that programmes are being scaled up in such countries as Malawi, Kenya, Zambia and Mozambique.⁴⁹ The South African model of more or less unconditional transfers is being emulated (as opposed to conditional grants which characterise South American equivalents),⁵⁰ focussing on the ultra poor and vulnerability due to HIV. The 'win win' of these grants has been showed to be dramatic in development terms. For instance, a recent reports indicates that in Namibia, the payment of a grant to orphaned and vulnerable children, in respect of which the numbers of recipients have tripled in four years, has lead to a concomitant increase in birth registration, which is a vital aspect of development services (such as immunization).⁵¹

⁴⁷ There is an extensive jurisprudence and academic interpretation that has built up in the aftermath of *Grootboom* which illustrates the scope and realm of possibility in regard to litigation in this sphere too.

⁴⁸ See Nyamweya P et al, 'Evaluation of Sida support to Unicef country programme, Kenya (2006)' available at <www.oecd.org/dataoecd/5/8/39125999.pdf>. For a discussion of cash transfers in Africa, see Kakwani, N, Soares, F, and Son, HH (2006) 'Cash Transfers for School-Age Children in African Countries: Simulation of Impacts on Poverty and School Attendance' *Development Policy Review* 24 (5), 553–569; Kakwani, N, Soares, F, and Son, HH (2005) *Conditional Cash Transfers in African Countries* Brasilia: International Poverty Centre; MCDSS/GTZ (2005) *Monitoring Report of the Pilot Social Cash Transfer Scheme, Kalomo District, Zambia* (2nd edn). Lusaka: Ministry of Community Development and Social Services; Schubert, B and Slater, R 'Social Cash Transfers in Low-Income African Countries: Conditional or Unconditional?' (2006) 24(5) *Development Policy Review* 571-578 and Sridhar, D and Duffield, A 'A review of the impact of cash transfer programmes on child nutritional status' Save the Children UK, 2006, available at www.savethechildren.org.uk

⁴⁹ Handa, S, UNICEF ESARO 'Social cash transfers as a tool to tackle child poverty' presentation at the 3rd policy conference on child poverty, Addis Ababa, May 2008, available at www.africanchildpolicyforum.org

⁵⁰ Handa, note 49 above.

⁵¹ www.irinnews.org of 22 September 2008.

In Kenya, too, an evaluation of the first phase of a limited social cash transfer system indicated that it had major positive spin offs for children's access to health and to education, and that there was little evidence of abuse in expenditure.⁵² In phase 2 of the programme, running from 2006-2010, the amount payable will increase to Ksh 1500 per beneficiary household per month, flat rate. It appears that innovative delivery mechanisms are being actively explored via cellphone delivery,⁵³ which cuts costs, administration, and eliminates the potential for corruption. The target beneficiaries are intended to reach 22,500 households with children in this financial year, expanding to 60 000 in 2008/9, 80 000 the following year to 100 000 of the poorest families in 2010-2011. Admittedly this initiative is not yet explicitly linked to law; however, this may still occur, as the legislative elaboration of foster care and alternative care is currently being explored to provide more detail to the Kenya Children's Act of 2001.⁵⁴

3.2 Inheritance, law and the effects of HIV

Inheritance has been an arena of legislative activity in Southern and Eastern African countries since the late 1990s. This has come about because of the increasing dispossession of women and children of land and homes, often resulting from the death of the male relative due to HIV/Aids. Customary inheritance laws generally operate to disallow inheritance by widows, and amongst children, it is generally only the eldest male relative who takes over the estate (who may or may not be a child). In practice, property grabbing was a frequent occurrence, leaving children landless and destitute.

In some instances, law reform has been topic specific, such as the Malawi Inheritance Act of 1998 which applies to the benefit of women and children. However, Lesotho has included provisions on the administration of estates for the protection of children in the Child Care and Protection Bill, and according to reports, even though this Bill is not finalised, duty bearers – banks, the office of the master of the High Court – tasked with identifying assets and ensuring that the children of deceased parents have their interest in property recorded and preserved – are already implementing the desired provisions.⁵⁵ Expedited and cost effective procedures for guardianship and custody of children affected by HIV after the death of care-givers also features as an element of the Namibia Children's Status Act of 2006, which also includes provisions aimed to curb unscrupulous abuse of children's assets. The legislation also for the first time provides for the rights of children born outside marriage to inherit from their fathers in the absence of a will. Preservation of children's inheritance features in the draft codes of Mozambique and of Swaziland. The economic dimensions of inheritance law reforms to the benefit of children are patent.

⁵² Pearson, R, UNICEF Kenya, presentation at the 3rd international policy conference on child poverty, Addis Ababa, May 2008.

⁵³ 'Dial M for Cash' explaining an innovative mobile phone delivery system for transferring monies to communities via cell phone technology' (www.irinnews.org of Monday August 2008).

⁵⁴ A Hussein, note 8 above.

⁵⁵ Personal communication, Head of the Child Law Reform Committee, September 2008.

3.3 HIV Aids and alternative care

In Malawi, in 2005, the government launched the National Plan of Action for Orphans and Vulnerable Children.⁵⁶ This policy provides an overarching framework for the government and other stakeholders, like the civil society and donors, to work together to address the problems of vulnerable children in the context of HIV Aids. The government has also been implementing an orphan care community-based programme. Under this initiative, training and resources are provided to community-based structures such as families and religious groups, who look after orphans and needy children. The structures include families and religious institutions. A limited foster care scheme exists that makes provision for a monthly stipend of K200 (US\$ 1.5) to foster parents in this context. The Malawi Child Care and Protection Bill of 2006 includes detailed provisions on foster care, and according to the 2nd Periodic Report on the Convention on the Rights of the Child of Malawi, due to be discussed shortly by the CRC Committee in late 2008, adoption provisions are also being overhauled to improve care and protection relating to child victims of HIV/Aids. In Mozambique, too, a cash transfer scheme has been a primary response to assist households worst affected by HIV. The amount involved is very small, but is nevertheless significant in reaching the most vulnerable households.⁵⁷

The Lesotho Children's Protection and Welfare Bill, 2004, makes several important innovations in respect of children without parental care. First, it provides for the right of orphaned and vulnerable children to vital registration. Registration of orphans also appears to be a response adopted in Botswana, and the point is to be able to target services to such vulnerable children. Thus in Botswana, registered orphaned and vulnerable children are also registered with the name of a care-giver, who is then eligible to receive assistance in the form of monthly food baskets. There is also, in some cases, the possibility of free school uniforms, waiver of schools fees and housing assistance.⁵⁸

Clearly, initiatives to address vulnerable children in the context of the HIV pandemic carry with them economic and service delivery implications, hence the common theme that legislative endeavours are breaking new ground in providing specifically for children faced by orphanhood or Aids-related vulnerability. The South African Children's Act, in sections dedicated to the recognition of independently functioning child-headed households, go furthest in this regard.⁵⁹

3.4 Costing children's law and children's budget processes

The lauded South African process of costing as part and parcel of implementation planning is likely to be emulated regionally. The intention is to do costing training and to undertake a costing of the Lesotho legislation once it is finalised. In fact, donor commitments to avail considerable resources for implementation of the Act in that country have already been

⁵⁶ See, too, for a description of the Lesotho national policy for orphans and vulnerable children, Kimane I and Chipoyera, H 'Discussion Document on Child Labour in Lesotho' (International Labour Organisation, unpublished draft dated 24 May 2006) at 33, quoted in Sloth-Nielsen J et al (note 22 above).

⁵⁷ 'Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Africa', Save the Children, UK, 2006, p 24 – 25.

⁵⁸ "Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Africa", Save the Children, UK, 2006 at p 25.

⁵⁹ See Sloth-Nielsen, J et al (note 21 above); Sloth-Nielsen, J 'Chapter 7 (part 4): Child Protection' in Skelton, A and Davel, CJ (eds) *A Commentary on the Children's Act* (Juta and Co Lansdown, 2008, forthcoming).

made:⁶⁰ another good reason for imbuing law reform processes with economic realities, as donor and intergovernmental aid can be harnessed to the same, unified, end-goal.

A related development can be identified in child rights budgeting initiatives in Southern Africa. The *Imali Ye Mwana* Network, established in December 2004, consists of participating partners from South Africa, Zimbabwe, Zambia, Swaziland and Botswana. Initially, the projects are focussing on developing monitoring tools for implementation of the child's rights to education.⁶¹ The intention is not merely to determine available resources, but also to determine the impact of government spending on the programme. As is to be expected, a major challenge is the lack of reliable and disaggregated expenditure information.⁶² Probably the greatest achievement of children's budget programmes is to increase the visibility of children in economic processes⁶³ and thereafter in influencing the data collection tools to reflect children's economic interest.

3.5 Human resources and skills development

The children's law reform processes have identified a crucial economic dimension to protection of children and promotion of their rights: the need for social services, a scarce resource on the continent generally. In Mozambique when initial consultations on the child law reform processes were undertaken, it was intimated that there were fewer than 10 qualified social workers in the whole country, serving a population of 16 million people spread over a vast geographical region. The scarcity of social workers was one theme around which a working group of the Lesotho Child Law Reform Committee centred its work.⁶⁴ And the South African costing experience found that the pre-existing lack of human resources to deliver social services to be a critical impediment to implementation. The consequences are stark: it is not only cash that is required but investment in children's services seen more broadly. Of course, local suitability must also dictate the form and level of skills enhancement that are required to be furthered.

4. Conclusions

It is concluded that economic dimensions came to take a centre stage in children's law reform processes in South Africa after the first brush with costing the Child Justice Bill. The costing processes and children's budget initiatives, as described here, marry disciplines that were previously rather segregated: economists and lawyers. Fresh working methods and new tools of analysis have had to be developed to enable meaningful cross-fertilisation so that sensible budget and costing outcomes to be reached. It is suggested that the inputs of economists in the South African Children's Act processes has undoubtedly enhanced the quality of law reform outcomes and of programme design, which without the fiscal dimension would have lacked grounding. Moreover, substantial expertise in costing and budgeting was transferred to

⁶⁰ Personal Communication, Head of the Child Law Reform Committee, September 2007.

⁶¹ Claasen, M 'Child rights budgeting initiatives in Southern Africa: experiences and lessons' presentation delivered at the 3rd International Policy Conference on Child Poverty, Addis Ababa, 13 May 2008 (available at www.africanchildforum.org)

⁶² Claasen, note 62 above.

⁶³ Kimane records how children were involved not only in the Child Law Review Process in Lesotho, but also in the development of the Lesotho Poverty Reduction Strategy (PRS), a strategy which was required of all Highly Indebted Poor Countries (HIPC) in the early part of the millennium by the World Bank as a precondition for debt alleviation (Kimane note 4 above).

⁶⁴ Kimane (note 4 above).

government, which ultimately had to examine what services were presently being delivered, what these cost, and what would be required in future under new laws.

Next, a spin off was the logical progression to implementation planning, which has made the eventual delivery of the promise the laws hold for children so much more real: and, in the case of the Child Justice Bill, the Parliamentary delay has born the unexpected fruit that a good number of the required services are already in place. It was further noted that the South African experience has drawn attention regionally, and that children's law reform processes in neighbouring countries are taking heed of the positive consequences of costing and implementation planning.

Although children's budget projects, SCT programmes and law reform have not yet necessarily coalesced around legislative provisions in most southern and eastern African countries outside South Africa, it can be argued that the stage has been set for a legislative framework for child support to be advocated for more firmly. Certainly, the success of SCT programmes also provides an opportunity to draw donor programmes closer, and to unify these with a national policy concerning child vulnerability in the respective countries. The discussion above relates to law reform processes that are all obviously work in progress. However, the underlying the premise this article relates to the distributional promise inherent in the domestication of international treaties concerning the rights of the child. Here, I believe, that child law reform provides low income and developing countries with a real opportunity to set a rights-based resource agenda for children and to identify them explicitly as beneficiaries of development.

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