The Social Assistance Act has been interpreted to delegate the decisions on the qualifying age limit and income threshold for the Child Support Grant to two Executive Ministers. Is the delegation constitutional?

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PRDPAU001
Registered for LLM in constitutional and administrative law
Minor dissertation supervised by Prof Hugh Corder
20 February 2009

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LLM in constitutional and administrative law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM minor dissertations, including those relating to length[1] and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed: Signed by candidate
Date: 20/2/2009

[1] The main text of the dissertation is less than 25 000 words, but the footnotes add a further 4000 words. I have applied for condonation for the extra words.

Note: The author is the Manager of the Child Rights Programme at the Children's Institute (CI), University of Cape Town and a Board member of the Alliance for Children's Entitlement to Social Security (ACESS). The section of this dissertation on the Child Support Grant expansion campaigns is based on the author's personal experience of playing a leadership role in CI and ACESS since the year 2000.

Contents

Chapter 1 - Introduction

Sections 5(2), 32(1) and (2), of the Social Assistance Act 13 of 2004 have been interpreted by the Ministers of Social Development (SD) and Finance to delegate authority to them to determine the age limit of children and the income threshold of caregivers who qualify for the Child Support Grant (CSG).

The Minister of SD, with the concurrence of the Minister of Finance, has promulgated two sets of regulations in terms of s32 of the Act. The first set was promulgated in February 2005[2] ('the 2005 regulations'). The second set, which repealed the first set, was promulgated in August 2008[3] ('the 2008 regulations').

In regard to the age limit, the 2005 regulations set the age limit at 14 years[4] and the 2008 regulations set the age limit at 15 years with effect from 1 January 2009.[5] The current age limit is therefore 15 years of age. This means that children qualify until their 15th birthday after which their grant is terminated, and that children who are already 15 years of age or older do not qualify for the CSG.

Caregivers of children qualify for the CSG if their income is below a threshold set in the regulations. The 2005 regulations did not set an income threshold but provided that the Minister of SD would set the threshold by notice in the government gazette.[6] However, no such notice was ever promulgated. The regulations promulgated under the previous Act[7] in 1998[8], set the threshold at R800/month for urban areas and R1100/month for rural areas or beneficiaries

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[2] Social Assistance Act 13 of 2004: *Regulations* GNR162 in GG 27316 of 22 February 2005
[3] Social Assistance Act 13 of 2004: *Regulations* GNR 898 in GG 31356 of 22 August 2008
[4] Reg 4(4) (a) read with 32(2) (b). These regulations came into effect on 1 April 2006 when the Social Assistance Act of 2004 came into effect.
[5] Reg 6(4) read with 28(2)(b) and 38(2)
[6] Regs 4(2) (b) and 22(2)
[7] Social Assistance Act 59 of 1992
[8] Social Assistance Act 59 of 1992: *Regulations* GNR418 in GG 18771 of 31 March 1998

living in informal dwellings.[9] In the absence of a notice being issued under the 2005 regulations, the income threshold set in the 1998 regulations was applied until August 2008, when the 2008 regulations specified a new income threshold formula.[10] The new formula resulted in the income threshold being set at R2200/month. The formula for the income threshold determination includes the amount of the grant as a component of the formula which means that as the grant amount is increased with inflation every year, so the income threshold automatically increases accordingly. With the October 2008 and February 2009 inflation related increases to the amount of the CSG, the income threshold is now R2400/month.

Child poverty levels in South Africa are unacceptably high with approximately 68% of children living in households with an income of less than R1200/month.[11] Child poverty statistics reveal that child poverty is disproportionably carried by African Black children. Measures that the State adopts to address income poverty will therefore not only impact on children's rights to social security, but also equality as well as a number of other rights.

The Bill of Rights guarantees a range of socio-economic rights for children and their caregivers, including social security.[12] The right to equal protection and benefit of the law, and protection against discrimination on the basis of age and race are also provided for in section 9. The State is obliged to respect, promote, protect and fulfil all these rights.[13] With regards the right to social security, the State must refrain from taking retrogressive steps that amount to negative infringements of the right. On the positive obligation side, the State must take

[9] Reg 16(2)
[10] Reg 6(1) (b) read with 18(1), 19(1) and Annexure B
[11] H Meintjies et al 'Demography of South Africa's children' in Proudlock P et al (Eds) *South African Child Gauge 2007/08* Children's Institute Page 64
[12] S27(1) (c)
[13] S7(2)

reasonable measures within its available resources to achieve the progressive realisation of the right.[14]

The State has adopted the CSG as its primary measure for the realisation of children's rights to social security. The CSG therefore needs to be measured against the State's constitutional obligations in respect to the right to social security. The impact of the CSG (or lack of access to the CSG) on children's rights to equality as well as on a number of other rights, is a relevant factor in the application of the reasonableness analysis in terms of section 27(2).[15]

Civil society organizations, that represent the interests of children, have been campaigning since the introduction of the CSG in the late 1990's for increases to the age limit and for annual inflation related increases to the income threshold. This campaigning has included the generation of new evidence, participation in political party processes, parliamentary lobbying, mass mobilisation, direct dialogue with the Executive, and litigation.

The age limits of 14 and 15 years set in the 2005 and 2008 regulations respectively, and the income threshold of R800 or R1100, set in the 1998 regulations, both became the subject of High Court litigation in 2008. The legal challenge to the age limit, *Mahlangu v Minister of Social Development and Others,* [16] was launched in 2005 and heard by the Pretoria High Court in March 2008. Judgment is still pending. Legal proceedings to challenge the income threshold, *Ncamile and Children's Institute v South African Social Security Agency, Eastern Cape Regional Office and Others* [17] began in February 2008 in the Grahamstown High Court and were withdrawn in August 2008 when regulations announcing a new income threshold, which remedied the rights

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[14] S27(2)
[15] See *Khosa and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) paras 44 and 45
[16] Case no 25754/05 Transvaal Provincial Division of the High Court (Heard 4 March 2008)
[17] Case no 227/2008 Eastern Cape Provincial Division of the High Court (withdrawn)

violation, were promulgated.[18]

In *Mahlangu* the applicant argued that the Social Assistance Act does not expressly confer authority on the Ministers to limit the qualifying age of children below the age of 18 years.[19] Based on this argument, the applicant asked the court to declare the regulations to be unconstitutional for violating the constitutional principle of legality and the requirement of lawfulness in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The Minister of SD did not agree with the applicant's argument on unlawfulness and put forward his interpretation that the Act does delegate the decision on the age limit to him to make in regulations.[20] Judgment in *Mahlangu* is still pending and the Court has not yet ruled on which interpretation is correct.

I have authored an expert affidavit[21] for the applicant in *Mahlangu* and agree with the legality argument and all other arguments put forward by the applicant's lawyers. The legality argument was not raised in the *Ncamile* case.

In this dissertation I raise an additional argument that was not raised in either of the two cases but that I believe has merit.

I argue that if the Minister of SD's interpretation of the Act is found to be correct by the Court, then it should be argued that the provisions of the Act that delegate the decisions, namely sections 5(2), 31(1) and (2), are unconstitutional. I motivate this conclusion with reference to a number of constitutional provisions, provisions of PAJA, and case law. Based on my analysis I argue that the decision on the age limit should preferably be made by Parliament itself but that it can be delegated if certain conditions are met. In regard to the income

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[18] Social Assistance Act 13 of 2004: *Regulations* GNR 898 in GG 31356 of 22 August 2008
[19] Applicants Heads of Argument in *Mahlangu* paras 71 to 98 (On file with author).
[20] Heads of Argument for the Minister of SD in *Mahlangu* February 2008 paras 31 to 55 (On file with the author)
[21] P Proudlock Replying and answering affidavit in *Mahlangu* July 2007 (On file with the author).

threshold I argue that the decision can be delegated but also subject to certain conditions being met.

The conditions that should be met are the following:
(a) The Social Assistance Act should provide criteria to guide the Ministers in their decision-making in order to guard against potential unconstitutional limitations of children's rights, and
(b) the Social Assistance Act should expressly provide for parliamentary supervision over the delegation or Parliament should introduce a mechanism to scrutinise regulations in order to guard against unconstitutional limitations of human rights, and
(c) the Social Assistance Act should expressly provide for public participation in the making of the regulations, or PAJA should be amended (or interpreted) to create a clear statutory obligation on the Executive to facilitate public participation in the making of regulations that determine eligibility criteria for accessing state socio-economic benefits and services.

The argument made out in this dissertation could bolster the argument of the applicant in *Mahlangu* that the regulations are unlawful. This is because if the argument in this dissertation is convincing, it could aid the High Court in coming to *a* finding that the Act should not be interpreted to grant such authority to the Ministers. Section 39(2) of the Bill of Rights obliges the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation. An interpretation of the Social Assistance Act that allows the Ministers to limit children's rights without the Act providing guidance to guard against an unconstitutional limitation, would not be an interpretation that promotes the spirit, purport and objects of the Bill of Rights. In the second instance, in the event of the applicant's argument on unlawfulness being unsuccessful in the High Court, the argument in this dissertation could be raised on appeal. It could be raised by amicus curiae and could be of relevance for the substance of the case as well as providing assistance to the Court in crafting an appropriate remedy. For

example if the argument in this dissertation is correct, the Court should declare the relevant sections of the Social Assistance Act to be unconstitutional and refer them back to Parliament to be amended so as to provide sufficient guidance to the Executive.[22]

1. 1 Outline of argument

The outline of my argument is as follows:

In **chapter 2** I describe the relevant provisions of the Social Assistance Act and its regulations that have been interpreted to result in the age limit and income threshold decisions being delegated to two Executive Ministers.

In **chapter 3** I look at the extent of child poverty and the impact of the CSG regulations on children. The applicants in both *Mahlangu* and *Ncamile* argued that the regulations should be declared unconstitutional because they violate children's rights. The infringements by the State that are argued include:
(a) an unjustifiable limitation of approximately 2 million older children's rights to equality by excluding children aged 15 to 18 years from being eligible for the CSG,
(b) a failure to take reasonable measures within its available resources to ensure the progressive realisation of caregivers and children's rights to social security by failing to have a plan to eventually extend the CSG to all poor children under 18 years of age, and
(c) a failure to prevent a retrogressive erosion of children's rights to social security by failing for a period of ten years to annually adjust the income threshold of the CSG with inflation.[23]

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[22] This was the Constitutional Court's approach to remedy in *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) see paras 59 to 68.
[23] See Applicants Heads of Argument in *Mahlangu,* First applicant's (Mrs Ncamile) founding affidavit in *Ncamile* and Second applicant's (Children's Institute) founding affidavit in *Ncamile* (on file with the author). The evidence of rights violations and the arguments showing that the violations were not

I do not elaborate extensively on this area of law in this dissertation as it is essentially set out in the applicants' heads of argument in *Mahlangu*[24] and is also a topic for a whole other dissertation.

In **chapter 4** I describe how civil society organisations have campaigned for amendments to the Act and its regulations to ensure that children's rights are realised.

In regard to the age limit I show that the decision to extend the age limit from 7 to 14 years was made by the Executive only after significant advocacy pressure from civil society. However, the regulations that introduced the extension were not published for comment. While the extension to 14 was in general positive for children, the design of the phased extension caused infringements of approximately 150 000 children's rights in each year of the extension as they fell off the CSG between the yearly phases and had to re-apply the next year. The Executive decision-making on whether to extend beyond 14 years has also not included a public participation process. I show further that Parliament played a limited role in participating in these decisions and did not supervise its delegated authority. Civil society eventually approached the High Court for relief for approximately 2 million poor children aged 15 to 18 years and judgment is pending.

In regard to the income threshold decision I show that the threshold remained static for ten years despite inflation. The Ministers omitted to remedy the problem despite civil society bringing the problem to their attention over a period of 8 years. Parliament did not supervise the delegation. Regulations to amend the offending regulations were not published for comment and the matter was

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reasonable or justifiable are convincing and I agree with the applicants' arguments in both cases. I signed expert affidavits that provided evidence upon which the arguments are based.

[24] Written by Advocates Alan Dodson and Carol Steinberg with assistance from Sandra Liebenberg, Professor in Human Rights at the University of Stellenbosh.

therefore never officially 'on the table' for discussion. After litigation was initiated by civil society in early 2008, a new income formula to address the problem was proposed and promulgated in regulations in August 2008. These regulations were not published for comment prior to promulgation. A draft was however presented to Parliament in June 2008 after civil society lobbied Parliament.

In the description of the two expansion campaigns, the role of the Minister of Finance is described. While the need for the concurrence of the Minister of Finance is a necessary requirement for regulations that have significant budgetary implications, in practice it has resulted in the Minister of Finance effectively having a veto over the Minister of SD's proposals for amendments to the regulations and that the Minister of Finance's decision-making is divorced of the public participation and parliamentary processes.

In **chapter 5** I list the relevant constitutional provisions, analyse the case law on these provisions, and apply this analysis to the CSG case studies. The relevant constitutional provisions include the constitutional principles of separation of powers, and representative and participatory democratic government; the constitutional provisions that vest legislative authority in Parliament and that set down the procedures for passage of laws including the requirement of public participation; and the fundamental rights to social security and equality.

The Constitutional Court ruled in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*[25] that Parliament may not delegate its plenary powers to amend or repeal a law, as this subverts the manner and form provisions of the Constitution that regulate the parliamentary law-making processes. I question whether the delegation of the age limit decision by Parliament to the Executive also results in a subversion of the manner and form provisions. I look at the rationale behind the manner and form provisions in Chapter 4 of the Constitution and the case law upholding these

[25] 1995(10) BCLR 1289 (CC)

provisions. I then juxtapose this with the manner and form provisions protecting the regulation-making process in PAJA and the case law on PAJA. I conclude that the parliamentary law-making process provides considerably more protection, particularly of the right of the public to participate in the law-making process. The relegation of a decision to the Executive to be made in regulations therefore has significant negative consequences and there should therefore be strict limits on what decisions can be delegated.

The Court also ruled in *Executive Council of the Western Cape Legislature (1995)* that Parliament may delegate matters of detail to the Executive to be prescribed in regulations. The majority judgment of the Court did not however provide any guidance on what constitutes 'detail'. However a separate concurring judgment by Sachs J, provides compelling arguments in favour of 'questions of broad and of controversial legislative policy' being decided by Parliament itself.

The decision on the age limit involves the rights of approximately 2 million poor children[26] between the age of 15 and 18 years and a total annual budget of approximately R5.4 billion.[27] A range of civil society organizations including the Alliance for Children's Entitlement to Social Security (ACESS), Children's Institute (CI), Congress of South African Trade Unions (COSATU), South African Council of Churches (SACC), Peoples Budget Campaign, and the Treatment Action Campaign (TAC) as well as the United Nations Committee on the Rights of the Child and the South African Human Rights Commission have all been calling for the extension to 18 over the past ten years. The subject has generated considerable public and media debate, numerous submissions to

[26] Applicant's Heads of Argument in *Mahlangu* Para 54 (on file with author).

[27] D Budlender Draft Affidavit in *Mahlangu* February 2008. Note that the figure of R5.4 billion is based on a formula that contemplates immediate extension to all eligible children in the age categories of 15 to 18 in 2008 and immediate take up. A phased extension is more likely to be implemented with the result that the first extension to 15 year olds in 2009 would cost R1.9 billion, the second extension to 16 year olds in 2010 (including the previous year's 15 year olds as well) would cost R3.6 billion and the third extension to 17 year olds in 2011 would cost R5. 2 billion (including the previous two years' 15 and 16 year olds as well). These latter cost estimates come from the Department of Social Development and were reported on 30 January 2009 in ANC Today on www.anc.org.za

Parliament and the Executive, and a High Court challenge. The age limit debates have also brought to light a strong difference of opinion on social policy between the Ministers of SD and Finance. The expansion campaign story in chapter 4 also illustrates an over-concentration of power in the hands of the Minister of Finance. The age limit decision is therefore not a small matter, not a matter of detail, but a matter of great importance that falls into the category of 'broad and controversial legislative policy' that should be decided, or at least strongly guided and supervised by Parliament.

The cases of *August v Electoral Commission*[28] and *NUMSA and Others v Badar BOP (Pty)(Ltd) and Another*[29] provide further guidance on delegations. In these two cases the Court ruled that if Parliament intends to limit human rights it should do so expressly and clearly. The Social Assistance Act does not clearly express Parliament's intention to limit children's rights to social security or equality. Based on the interpretative principle expressed in s39(2) of the Bill of Rights, this lack of clarity could bring the Court to conclude that Parliament did not intend to limit children's rights in the Social Assistance Act and that the Ministers have therefore acted unlawfully by limiting children's rights in the regulations.

The Court has also ruled in *Dawood and Another v Minister of Home Affairs and Others*[30] that if Parliament delegates decisions that have the potential to limit human rights, to the Executive, it should provide criteria to guide the Executive in its decision-making in order to guard against unconstitutional limitations of rights. The Social Assistance Act has been interpreted to delegate the decisions on the age limit and income threshold and the Ministers have set an age limit and income threshold that limits children's rights. Except for repeating the wording of section 27 (1) (c) and (3) of the Bill of Rights in the preamble to the

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[28] 1999 (4) BCLR 363 (CC) at para 33
[29] 2003 (3) SA 513 (CC) at para 37
[30] 2000 (3) SA 936 (CC)

Act, the Act does not provide any guiding criteria to the Executive to use when making its decisions.

I argue in summary that the delegation of the age limit and income threshold decisions by Parliament is unconstitutional, that Parliament should preferably make the age limit decision itself, but that both decisions could be delegated if the Act provides express criteria to guide the Executive in its decision-making processes.

In **chapter 6** I argue that based on the CSG expansion campaign experience, guiding criteria in the Act would not necessarily be sufficient to protect children's rights from potential unconstitutional limitations by the Executive. This is primarily because the Executive's regulation-making processes are not deliberative, transparent or participatory and because Parliament generally does not supervise its delegations.

I argue that as a result of the lack of participation opportunities and the lack of parliamentary supervision, civil society eventually turned to the Courts to have their voices heard in the decision-making processes and to protect children's rights from unconstitutional limitations.

The income threshold litigation eventually achieved results but for ten years children's rights were limited unreasonably. The age limit case took 3 years to get to court in 2008 and judgment is still pending a year later. Two million children aged 15 to 18 years are still excluded from the grant and their rights are therefore not yet realised. These timeframes demonstrate that while litigation can yield results in the long term, more participatory and rights-based decision-making by the Executive in its regulation-making processes, and greater guidance and supervision by Parliament, could pro-actively protect children's rights from unconstitutional limitations. Thus while supporting the need for the Courts to intervene when the Executive and Parliament are acting

unconstitutionally, I argue that ideally such decisions should be supervised by Parliament and decided by the Executive with maximum participation of the persons affected by the decisions and the interest groups representing them.

I describe the provisions of PAJA and the case law which do not provide adequate protection of the public's right to participate in regulation-making processes and do not promote a culture of deliberation or justification. I also describe the absence of a scrutiny mechanism in Parliament and the long history behind this absence. I argue that if these two problems persist, despite the existence of guiding criteria in the Act, it will be left to civil society to monitor and challenge any decisions that have the potential to limit human rights. A more proactive way of ensuring that unconstitutional rights limitations do not occur, would be for the Executive's regulation-making processes to be improved to be more participatory and deliberative, and for Parliament to actively scrutinise regulations. This could be achieved by express provisions in the Social Assistance Act providing for parliamentary scrutiny and public participation, or through amendments to PAJA to strengthen the protection of the right to participation, and the introduction of a permanent scrutiny mechanism in Parliament.

In **chapter 7** I summarise my argument and recommendations for reform.

Chapter 2 - Statutory framework

The Social Assistance Act[31] does not expressly set an age limit for children to be eligible for the CSG or an income threshold with which the caregivers must comply in order to qualify. In s5(2) read with s32(1) and (2) the Act delegates a general authority to the Minister of SD with the concurrence of the Minister of Finance, to set age limits and income thresholds for social assistance.

The Act has been interpreted by the Executive to give the Minister of SD, with the concurrence of the Minister of Finance, the authority to decide on and set the age limit and the income threshold for the CSG.

The relevant sections of the Act and the regulations are quoted below:

2.1 Social Assistance Act of 2004

> **'Definitions**
> ...
> "**child**" means a person under the age of 18 years;
> "**child support grant**" means a grant made in terms of section 6;....
>
> **Provision of social grants**
> 4. The Minister must, with the concurrence of the Minister of Finance, out of moneys appropriated by Parliament for that purpose, make available –
> (a) a child support grant; ...
>
> **Eligibility for social assistance**
> 5. (1) A person is entitled to the appropriate social assistance if he or she –
> (a) is eligible in terms of section 6, 7, 8, 9, 10, 11, 12 or 13; ....
> and...
> (d) complies with any additional requirements or conditions prescribed in terms of subsection (2); ....
> (2) The Minister may prescribe additional requirements or conditions in respect of –
> (a) income thresholds;

[31] The Act came into effect on 1 April 2006

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> (a) income thresholds;

[31] The Act came into effect on 1 April 2006

(b) means testing;
(c) age limits, disabilities and care dependency; ....

Child support grant
6. A person is, subject to section 5, eligible for a child support grant if he or she is the primary care giver of that child.

Regulations
32. (1) The Minister must make regulations regarding any matter that must be prescribed in terms of this Act and may subject to subsection (2) make regulations regarding –
(a) any matter that may be prescribed in terms of this Act; ....
(2) The Minister must make regulations with the concurrence of the Minister of Finance if the regulations apply to –
....
(b) requirements or conditions in respect of eligibility for grants;...'

Except for repeating section 27(1) (c) and 27(2) of the Bill of Rights in the preamble to the Act, the Act does not contain any provisions providing guidance to the Ministers for the exercise of their discretion. It also does not provide for parliamentary supervision, or for public participation in the making of the regulations.

2.2 Regulations

The Ministers have promulgated three comprehensive sets of regulations that are pertinent for this dissertation. These are the 1998, 2005 and 2008 regulations respectively.

2.2.1 The 1998 regulations

The 1998 regulations[32] on the income threshold were applied until August 2008 when the new threshold was promulgated in the 2008 regulations. The 1998 regulations provided as follows with respect to the income threshold:

> **'Definitions**
>
> 1...
>
> **"Personal income"** means the income of the primary care-giver and his or her spouse,...
>
> **Determining the financial criteria for a child support grant**
>
> 16. ...
>
> (2) A primary care giver shall qualify for [the grant] if his or her personal income is below-
>
> (i) R9 600 per annum; or
> (ii) R13 200 per annum and the child concerned and his or her primary care-giver either-
> (aa) live in a rural area; or
> (bb) live in an informal dwelling.'

2.2.2 The 2005 regulations

In February 2005, the Minister promulgated regulations in terms of section 32 of the Act.[33] These have subsequently been repealed by the 2008 regulations. I outline the 2005 regulations here because the applicants in *Mahlangu* and *Ncamile* both challenged these regulations as the cases were initiated or heard in early 2008 before the 2008 regulations came into force.

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[32] Social Assistance Act 59 of 1992: *Regulations* GNR418 in GG 18771 of 31 March 1998 as amended by Social Assistance Act 59 of 1992:*Amendment: Regulations* GNR813 in GG 20235 of 25 June 1999 and Social Assistance Act 59 of 1992:*Amendment: Regulations* GNR1233 in GG 22852 of 23 November 2001

[33] Social Assistance Act 13 of 2004: *Regulations*. GNR162 in GG 27316 of 22 February 2005

In regard to the age limit and income thresholds for the CSG, the 2005 regulations provided as follows:

> **' Persons eligible for a Child Support Grant**
> ...
> 4 (2) In addition to the requirements of sub-regulation (1), a person is eligible for a child support grant if-
> (a) he or she is the primary care-giver of the child concerned;
> (b) he or she satisfies the financial criteria determined by the Minister by notice in the Gazette ; .....
> (4) In addition to the requirements of sub regulations (1) and (2), the child in respect of whom the grant is made, must not be older than the age of 14 years; or of such higher age as the Minister may determine.
>
> **Determination of the financial criteria for a Child Support Grant**
> 22 (1) The Minister must, with the concurrence of the Minister of Finance,
> determine the amount of a child support grant by notice in the Gazette.
> (2) The primary caregiver qualifies for the amount referred to in sub-regulation (1), if his or her personal income is below an amount determined by the Minister by notice in the Gazette.
>
> **Lapsing of grants and unclaimed benefits**
> 32 (2) A child support grant lapses on the last day of the month in which the child in respect of whom the grant is paid –
> ....
> (b) attains the age of 14 years; or.....'

2.2.3 The 2008 regulations

In August 2008 the Minister repealed the 2005 regulations and promulgated a new set of regulations in terms of section 32 of the Act.[34] These regulations provide as follows:

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[34] Social Assistance Act 13 of 2004: *Regulations*. GNR 898 in GG 31356 of 22 August 2008

'Definitions
1. In these regulations, any word or expression to which a meaning has been assigned in the Act shall have the meaning so assigned and unless the context otherwise indicates - ....
"income" means income as contemplated in regulation 19;...

Persons eligible for child support grant
6.(1) In addition to the requirements contemplated in section 6 of the Act, a primary care giver is eligible for a child support grant if-
a) ...;
b) or she meets the requirements of the financial criteria set out in Annexure B;...
(4) With effect from 1 January 2009 a child support grant may be awarded to a child not older than 15 years.

Determination of financial criteria for older person's grant, disability grant, war veteran's grant, child support grant, foster child grant and care dependency grant
18. (1) The financial criteria in terms of which applicants for an older person's grant, a disability grant, a war veteran's grant, a child support grant, a foster child grant and a care dependency grant, respectively, qualify are set out in Annexures A, B, C and D, respectively.

Determination of means
19.(1) For the purposes of determining means, in respect of social assistance, except for a grant in-aid and the foster child grant, the income of the applicant is deemed to be the annual income for an applicant not in a spousal relationship, or half the annual income of the applicant and his or her spouse, where the applicant is in a spousal relationship, and "income" means- .....

Lapsing of social grant
28 (2) A child support grant lapses on the last day of the month in which the child- ...in respect of whom the child support grant is paid, attains the age of 15 years with effect from 1 January 2009; or.....

Repeal of regulations
(1) The regulations published by...Government Notice R162 in Gazette 27316 of 22 February 2005 are hereby repealed;....

(2) Despite sub regulation (1), regulation 4(4) (a) of Regulation 8156 published in Government Notice R.162 in Gazette 27316 of 22 February 2005 remains in force until 31 December 2008.

Annexure B

Determination of financial criteria for child support grant
(1) The maximum amount of a child support grant shall from time to time be determined by the Minister with the concurrence of the Minister of Finance by notice in the Gazette.
(2) (a) A primary caregiver meets the financial criteria as contemplated in regulation 6(1)(a) if the income of the applicant, contemplated in regulation 19 after permissible deductions contemplated in regulation 20 are effected, is below the income threshold as referred to in paragraph (b).
(b) The formula for the determination of the income threshold for the child support grant is:
A = B x 10; where –
A = annual income threshold, and
B = annual value of the child support grant...'

I now turn to describe the campaigns by civil society that were aimed at expanding the age limit and income threshold.

Chapter 3 - Impact of the decisions on children's rights

3.1 Extent and impact of poverty on children

The Constitution defines children as persons under the age of 18 years.[35] This is in line with the international definition of childhood in the United Nations Convention on the Rights of the Child.[36]

In July 2006, according to the General Household Survey 2006, there were 18.2 million children living in South Africa.[37] Of this total population of children, 12.3 million lived in households with an income of less than R1200 per month[38] which means that 68% of children in South Africa were living in poverty in 2006. Due to the legacy of Apartheid, poverty statistics are still closely aligned with race. Thus while the national average of child poverty is 68%, amongst African Black children the poverty rate is as high as 76% while for white children it is 2.8%.[39] Forty percent of children in South Africa live in households where the adults are not employed and of these 7.3 million children, 7.1 million are African Black.[40]

These statistics reveal that income poverty amongst children is very high and is disproportionately carried by African Black children. Measures aimed at alleviating or addressing income poverty in South Africa are therefore not only aimed at ensuring that all children can access their rights to social security, but also at achieving substantive equality - a founding principle and a core value and right in the Constitution.

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[35] s 28(3)
[36] (1989) art 1
[37] (fn 11)
[38] (fn 11) page 69
[39] (fn 11)
[40] (fn 11)page 70

3.2 The State's constitutional obligations to children

The Constitution guarantees for children and their caregivers a range of socio-economic rights. These include the rights of everyone to basic education[41] and the rights to have access to health care services,[42] social security,[43] sufficient food and water,[44] and adequate housing.[45] Children also have the additional rights to basic health care services, shelter, basic nutrition and social services.[46] The State is also obliged to protect children from neglect, abuse[47] and child labour.[48]

In regard to the socio-economic rights the State must have a plan and adopt measures (including legislation) aimed at fulfilling each of the rights. Some of the rights require priority and immediate attention, for instance children's rights to basic education and basic health care services, basic nutrition, shelter and social services,[49] while the rights of everyone in sections 26 and 27 may be progressively realised within available resources.[50]

The right to social security in section 27(1)(c) expressly refers to 'social assistance' for people who 'are unable to support themselves and their dependants' as one of the measures that the State must take in order to give effect to the right to social security. Social assistance is commonly understood to be non-contributory cash grants. This right was deliberately phrased to include social assistance in recognition that income poverty and income inequality need to be addressed to enable people to enjoy all their

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[41] s29(1)(a)
[42] s27(1)(a)
[43] s27(1) (c)
[44] s27(1) (b)
[45] s26(1)
[46] s28(1)(c)
[47] s28(1)(d)
[48] s28 (1)(e) and (f)
[49] These are all expressed as 'right to' and not as 'rights to have access to'. They are also not qualified by the words progressive realisation within available resources.
[50] s27(2)

other rights.[51] This is because the provision of social assistance to caregivers assists them to realise their children's rights to basic education, basic nutrition, sufficient food and water, shelter and basic health care services. It does this by contributing to the cash that is needed to pay for transport to get to school and to the clinic, to buy school stationery and textbooks, to buy food and pay rent, to buy fuel to cook food, and to pay for water and electricity above the basic minimum that is supplied for free. It also aids caregivers to prevent the neglect and abuse of children as well as prevent children from having to engage in child labour to contribute to the family's income.

By fulfilling the right to social assistance, the State is therefore also indirectly promoting the realisation of a range of other rights. The realisation of all of these rights is ultimately aimed at the achievement of equality,[52] improving the lives of all citizens and freeing the potential of each person.[53]

3.3 The State's measures to give effect to these constitutional obligations

To give effect to the constitutional obligation to provide social assistance, the State provides a range of social grants for pensioners, foster parents, caregivers of poor children, disabled people, and war veterans. These grants are all provided for in the Social Assistance Act. The preamble expressly quotes section 27(1) (c) and (2) of the Bill of Rights as providing the rationale for the Act.

The Act obliges the Minister to provide a CSG to primary care givers for the care of their children. Section 4(a) provides that 'The Minister must, with the concurrence of the Minister of Finance, out of moneys appropriated by

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[51] Theme Committee 4 – Fundamental Rights *Supplementary Memorandum on Bill of Rights and Party Submissions* (1995) Page 21 – 22 (on file with the author).
[52] See the Preamble, s1 (a), 7(1), 9 and 36(1) of the Constitution for references to equality as a core value underlying the Constitution.
[53] See the Preamble of the Constitution

Parliament for that purpose, make available – (a) a child support grant; ...' However, in section 5(2) read with section 32(1) and (2) the Act delegates to the Executive, the decisions on the age limit of qualifying children and the income threshold of qualifying caregivers.

3.4 The regulations unreasonably limit the rights of millions of children

The age limit and income threshold decisions by the Ministers have the potential to include or exclude millions of poor children from social assistance. While the Ministers might decide to include all poor children under 18 years, they might also decide to limit it to poor children under 15 years and to leave children aged 15 – 18 years with no social assistance. The latter is in fact what has happened. As a result, approximately 2 million children living in poverty, between the ages of 15 and 18 years have no access to social assistance.[54] Their rights to social security are therefore being limited. Their rights to equal protection and benefit of the law are also being limited by unfair discrimination on the basis of age (directly) and race (indirectly).

In regard to the income threshold, the Ministers set the threshold at R800 or R1100/ month in 1998 and did not increase it for ten years despite inflation impacting on the cost of living. This meant that the income threshold remained at the same rand value since its inception in 1998 resulting in approximately 5% of poor children who would have been eligible in 1998, being excluded from accessing the CSG in 2005.[55] This amounted to approximately 500 000 poor children under 14 years being excluded in 2005[56] and 700 000 in early 2008.[57] According to the Department of Social

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[54] Applicant's Heads of Argument in *Mahlangu* Para 54 (on file with author).
[55] See D Budlender et al 'At All Costs? Applying the means test for the Child Support Grant' Cape Town: CI & Centre for Actuarial Research, University of Cape Town (2005).
[56] ibid
[57] K Hall and P Proudlock 'Litigating for a better deal' in *Children's Institute Annual Report 2007/2008* Page 20

Development's own calculation estimates, in June 2008, this amounted to an exclusion of 987 000 poor children under 15 years.[58]

The State bears a negative obligation to refrain from taking any measures that would erode people's existing access to socio-economic rights. The State's omission to adjust the income threshold with inflation each year had the effect over a period of ten years of excluding poor people who one year previously were eligible. This amounts therefore to a retrogressive measure and the State bears a heavy onus to prove that such a limitation is reasonable and justifiable.

I do not elaborate more on the limitations to children's rights as this has been extensively argued in the Heads of Argument for the Applicant in *Mahlangu*[59]. I move now from the assumption that the decisions delegated to the Ministers have the potential to limit children's rights unconstitutionally. A solid case has been made out in the *Mahlangu* heads that such an unconstitutional limitation has in fact occurred in relation to the age limit and I agree with these arguments. The State's reform of the income threshold regulations in August 2008 is also an indication that the static income threshold of R800 or R1100 was an unconstitutional limitation of children's rights.

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[58] See the Department's presentation at www.pmg.org.za under the minutes of the Portfolio Committee on Social Development dated 25 June 2008

[59] Applicant's Heads of Argument in *Mahlangu* (on file with the author)

Chapter 4 - The CSG expansion campaigns

4.1 Introduction of the CSG in the late 1990s

In the 1990's the ending of Apartheid, entering the international human rights community, and the adoption of a new Constitution with a Bill of Rights, meant that nearly all South Africa's laws had to be re-conceptualised. One of the primary aims was to ensure equitable access for all to the country's resources. In the latter half of this decade of reform the government introduced the CSG as a replacement to the State Maintenance Grant (SMG).

The proposed CSG was criticised by human rights activists as a retrogressive measure in violation of the State's constitutional obligations to children. They criticised in particular the low level of the grant (a proposed R75 per child compared to the SMG which was R127 per child and R200 per mother at the time) and the limitation to children under 7 years of age (as compared to the SMG which provided cover up to 16 years of age).

The activists expressed concern about civil society's exclusion from the policy conceptualisation process (the Lund Committee), and executive dominance over the legislative process.[60] They also produced evidence that the new CSG would in fact reduce the government's expenditure on children's social grants for the first few years of its implementation and it was therefore a retrogressive measure.[61] At the parliamentary hearings in April 1997, all the

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[60] See S Liebenberg 'Child welfare reforms: equity with a vengeance' In *Poverty Profile* March 1997 IDASA; C Barberton 'Minister dashes hopes of children' In *Poverty Profile* April 1997 IDASA; IDASA press statement 'Moleketi shows Thatcher-like stubbornness' In *Poverty Profile* April 1997 IDASA; J Stokes 'New child grants may fall foul of Constitution – SAHRC' In *Poverty Profile* April 1997 IDASA; and V Taylor 'A price on children's protection?' In *Poverty Profile* April 1997 IDASA.

[61] See J Stokes 'Haste a recipe for disaster, says Cosatu' In *Poverty Profile* April 1997 IDASA; and C Haarmann and D Haarman 'Someone got their sums wrong' In *Poverty Profile* April 1997 IDASA.

major civil society networks and organizations,[62] as well as the country's human rights watchdogs,[63] expressed their opposition to the retrogressive aspects of the proposed CSG and called for greater consultation and a more expansive grant.

A strong Bill of Rights had recently been approved by the new Parliament and it contained an explicit justiciable right of everyone 'to have access to social security, including if they are unable to support themselves and their dependents, appropriate social assistance.'[64] It also included extra protection for children's socio-economic rights, which requires children's social needs to be given priority by government,[65] and clearly defined children as persons 'under the age of 18 years'.[66] Child poverty levels were also excessively high indicating an urgent need for a large scale social assistance programme for families. The general perspective in civil society at the time was that given the new constitutional obligations and the large scale poverty, the Lund Committee, the Minister of SD and ultimately Parliament could and should have pitched the grant value and age at a higher level.

Since the introduction of the CSG, civil society has continued to campaign - as individuals, organisations and as a collective in alliances[67] - for expansion of the eligibility criteria. This campaigning has included large-scale public education drives, parliamentary advocacy and lobbying, research, dialogue with the executive, and litigation.

The next sections describe the expansion campaigns in relation to the age limit and income threshold in more detail.

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[62] These included COSATU, IDASA, Community Law Centre at the University of Western Cape, and the Black Sash

[63] These included the South African Human Rights Commission and the Commission for Gender Equality.

[64] s27(1) (c)

[65] s28 (1) (c)

[66] s28(3)

[67] These alliances include ACESS, COSATU, TAC, SACC, Basic Income Grant Coalition, and the Peoples Budget Campaign.

4.2 Age limit

Over a period of eleven years, the age of eligibility has been incrementally extended from 7 to 15 years. Civil society continues to call for the final extension to 18 years. The Minister of SD has publicly announced an intention to extend to 18 years,[68] the African National Congress (ANC) 2009 election manifesto promises to extend to 18 years,[69] and the President announced a commitment to extend to 18 in his February 2009 State of the Nation Address.[70] These developments promise imminent reform.

However, another story indicating opposition to the extension is unfolding behind the scenes with the Ministers of Finance and SD both opposing a High Court application *(Mahlangu)* for the extension to 18. The case was heard in March 2008 and judgment is pending. The Minister of Finance also recently contradicted the President's commitment to extend to 18 years by announcing that the extension to 18 was not yet a decision but was still under consideration.[71]

4.2.1 The CSG is introduced with an age limit of 7 years

The age of eligibility for the CSG was one of the areas of major debate in the Lund Committee (the committee that conceptualized the CSG) and at the parliamentary stage. At the time the CSG was being conceptualised, the existing grant for children, the SMG, was available to children up to their 16th birthday. Accurate statistics were not available at the time but it was estimated that the grant reached approximately 400 000 mothers and children

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[68] Minister of Social Development *Social Cluster Media Briefing* Parliament 14 February 2008
[69] ANC Election Manifesto 10 January 2009 www.anc.org.za (Accessed on 11 January 2009)
[70] President's *State of the Nation Address to Parliament* 5 February 2009
[71] Minister of Finance *Budget Speech* 11 February 2009

in total.[72] The Lund Committee worked within the instruction from the Deputy Minister of Finance that they could not exceed the current budget for the SMG, which was R1.2 billion per year, and yet knew that they had to make the grant available to a much greater number of children.[73] They therefore had to limit the number of beneficiaries and proposed to target children under 9 years. Cabinet however approved a lower target of children aged 0 – 6 years and the Cabinet-approved version[74] of the age limit was not amended by Parliament.

The law therefore set the age limit at 7 years but also kept open a window of opportunity for further progressive extensions of the age limit by delegating authority to the Minister to increase the age by notice in the GG[75]. Further authority for the Minister's power to increase the age threshold was also stipulated in the general section giving the Minister a range of areas over which he had the authority to make regulations.[76] The clause further stipulated that the concurrence of the Minister of Finance was required for regulations on eligibility criteria.[77]

4.2.2 Extension to 14 years

In 2000 the Department of Social Development appointed a Committee of Inquiry[78] to conduct research and make recommendations for a comprehensive social security system for South Africa. This policy development process presented civil society with an opportunity to advocate for expansions to the CSG. The CI approached the Committee with concerns that children's needs were not being adequately covered, and the Committee

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[72] F Lund *Changing Social Policy: The Child Support Grant in South Africa* (2008) Human Sciences Research Council Page 16

[73] ibid page 30

[74] Cabinet's proposal is reflected in the Bill that was tabled in Parliament, the Welfare Laws Amendment Bill 90 of 1997. This part of the Bill was not amended by Parliament.

[75] Social Assistance Act of 1992 as amended by the Welfare Laws Amendment Act 106 of 1997. s2(d)

[76] Ibid s19(1) (c)

[77] Ibid s19(2)

[78] Committee of Inquiry into a Comprehensive System of Social Security for South Africa

requested the CI to write an Issue Paper on children's social security to aid the Committee in its work. The Issue Paper[79] emphasised the need to extend the age limit to 18 years.

On the mobilisation front, a new alliance of children's sector organizations, called the Alliance for Children's Entitlement to Social Security (ACESS) was established in 2001 at a workshop of children's rights organizations that was convened by the CI, Children's Rights Centre and Soul City. After discussing the social security needs of children and making recommendations for reforms, workshop participants formed ACESS and mandated the alliance to take the recommendations of the workshop forward into the various decision-making processes.

In its first three years of existence, much of ACESS's attention was focused on campaigning for the extension to 18 years. Submissions and presentations were made to the Committee of Inquiry,[80] the South African Law Reform Commission,[81] the Department of Social Development[82] and Parliament.[83] A large-scale child participatory research project was also initiated. A child's

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[79] T Guthrie et al 'Issue Paper on Social Security for Children' Child Health Policy Institute (Predecessor to the CI) and Black Sash For the Commission of Inquiry for a Comprehensive Social Security System for South Africa July 2000

[80] T Guthrie et al 'CI submission to the Department of Social Development on the Committee of Inquiry's Report' June 2002

[81] See P Proudlock et al 'Joint Submission by CI, ACESS and the AIDS Law Project (University of Witwatersrand) to the South African Law Commission on the Child Care Act Discussion Paper' April 2002

[82] P Proudlock 'ACESS's submission on the draft regulations of the Social Assistance Act' Submitted to the Department of Social Development May 2001; S Giese 'CI submission on the draft regulations of the Social Assistance Act' Submitted to the Department of Social Development April 2001; T Guthrie 'CI submission to the Department of Social Development on the Report of the Committee of Inquiry into a Comprehensive Social Security System' June 2002; P Proudlock 'ACESS submission to Department of Social Development on the Report of the Committee of Inquiry into a Comprehensive Social Security System' June 2002.

[83] P Proudlock 'ACESS Submission on the Committee of Inquiry Report into a comprehensive social security system: focus on the Child Support Grant and Basic Income Grant' Submission to the Portfolio Committee on Social Development November 2002; H Meintjes 'Considering social assistance for children in the context of HIV/AIDS' CI submission to Parliament on the Committee of Inquiry report June 2003; P Proudlock and S Rosa 'ACESS submission on the Report of the Committee of Inquiry into a comprehensive social security system' Submission to the Portfolio Committee on Social Development June 2003

quote from this research revealed the stark reality of the problems caused by the age limit of 7 years:

> 'In my family there are two little ones – I look after them, they are the ones I said I wash and dress everyday before I go to school. They get a grant. It helps with the food and clothes for them. I have heard it stops at 7 years. The older is 6 – what will we do when it stops?' (Girl, 16, Mpumalanga)[84]

The Committee of Inquiry released its report in March 2002[85] and recommended strongly that the CSG be extended to all poor children under 18 years. Cabinet met briefly to consider the Committee report in July 2002 and issued a press statement saying that it was considering extending the CSG to children above the age of 7 years but wanted more evidence that the extension would be effective. The Cabinet press statement also showed a leaning in favour of job creation strategies as an alternative to any further extensions of the social security system.[86]

The Executive did not plan to hold a public dialogue on the report so civil society lobbied Parliament to hold public hearings. At these hearings in November 2002 and June 2003 respectively, the majority of the civil society organizations and alliances called for the CSG to be extended to 18 years. These included ACESS, CI, Black Sash, COSATU, TAC, South African Human Rights Commission and the SACC.

With Cabinet showing resistance to the extension, and Parliament showing reluctance to supervise the Executive's decision making on the regulations, ACESS focused on persuading the ANC of the need for the extension. ACESS members were mobilised to call for the CSG extension through ANC branch processes and community media, and a delegation was sent to brief

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[84] See ACESS *Children speak out on poverty* Report on the ACESS Child Participation Process 2002.
[85] Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present, Protecting the Future* (2002)
[86] Cabinet Lekgotla 25 July 2002 Statement issued by Government Communication and Information System

the ANC Women's League. In September 2002 ANC delegates adopted a draft resolution at the ANC Policy Conference calling on government to extend the CSG from 7 to 14 years.[87]

To ensure that this draft resolution would become a final resolution, ACESS members continued their community campaigns, and organised a march at the December 2002 ANC National Policy Conference. Women and children lined the entrance to the conference and handed pamphlets to the ANC delegates. At the end of the day a petition was handed to the Minister of SD.

The ANC adopted a final resolution to expand the age limit from 7 to 14 years and this was then announced as government policy in February 2003.[88] The extension was articulated as a phased extension over a period of three years in an amendment to the regulations in March 2003.[89] Children under 9 qualified for the grant as of 1 April 2003, children under 11 as of 1 April 2004 and children under 14 as of 1 April 2005.

While the concept of the extension was a victory for poor children, the design of the phased-in extension caused much confusion and hardship over the three year period. Despite the major impact of the regulations on the lives of millions of children, and despite an apparent statutory obligation in the PAJA to publish the draft regulations for public comment,[90] the Department did not publish for comment. Instead, the Department forwarded a draft of the regulations to one organisation, the Black Sash, a week before the regulations were scheduled to be promulgated as final law and a week before the first extension was scheduled to begin. The Black Sash called an urgent meeting with the Department and two other organisations (CI and ACESS) to discuss the draft regulations. At this meeting, the three organisations

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[87] ANC National Policy Conference 2002 'Closing Statement and Summary of Draft Resolutions' 30 September 2002

[88] President's State of the Nation Address in Parliament February 2003

[89] Social Assistance Act 59 of 1992: Amendment: Regulations. GN No R.460 of 31 March 2003.

[90] No 3 of 2000 s 4

highlighted their concerns about the design of the phased-in extension as they foresaw the implementation problems that would result in the newly extended grants being terminated after a few months as children reached the cut-off age of 9 or 11 before the next phase of the extension began. However the Department did not consult with civil society in time to make the changes and they did not seriously consider the concerns that were expressed.

Over the three years of the extension, approximately 150 000 children per year had their grants terminated mid-year and had to endure months without a grant while waiting for the next phase of the extension to commence, when their caregivers would need to queue again and fill in a new application for the grant.[91] If a formal notice and comment procedure had been followed with adequate time for deliberation on the most appropriate design and the Department had seriously considered the comments received, it might have revised its decision in the light of these comments, thereby avoiding the hardship that the children had to endure over the three years of the extension. In the 2008 country-wide poverty hearings caregivers have raised this problem and refer to it as the 'stop-start-grant'.[92]

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[91] See P Proudlock 'The problems with the phased in approach to the extension of the child support grant to age 14' Presentation by ACESS to the NCOP Select Committee on Social Services 3 June 2003.; A Leatt 'Reaching out to children: an analysis of the first six months of the extension of the Child Support Grant in South Africa' CI working paper No. 1 November 2003; S Rosa and C Mpokotho 'Extension of the Child Support Grant to Children under 14 years: Monitoring Report' CI, University of Cape Town March 2004; and A Leatt (2004) 'Granting assistance: An analysis of the Child Support Grant and its extension to seven and eight year olds' CI working paper no. 2.

[92] "Bereft teen moves poverty hearings to tears" HWB press release. 6 September 2008. http://www.hwb.co.za/releases/080908_poverty_alice.html 'Others spoke of "stop-start" grants, which came then stopped'. The 2008 poverty hearings were organized by the African Monitor, the Southern Africa Trust, COSATU, Black Sash, the SACC, SANGOCO and the Human Rights Commission.

4.2.3 The new Social Assistance Act of 2004

In 2003 a new Social Assistance Bill[93] was tabled in Parliament. The Bill was to replace the 1992 Act that had been drafted by the Apartheid government. Parliamentary hearings were held and civil society again called for the extension to 18.[94] However, with 2003 being a pre-election year, Parliament rushed the deliberations process and did not clearly make the decision to extend to 18 although it was within its power to do so.

The new Act did however introduce a new feature in regard to the age limit. Whereas the 1992 Act prescribed an age threshold of 7 years and gave the Minister of SD with the concurrence of the Minister of Finance, the authority to set a higher threshold, the new Act does not expressly prescribe an age limit in the section that creates the CSG. However it does define a child as a person under 18 and orders the Minister to provide a child support grant to primary caregivers of children. It also gives the Minister, with the concurrence of the Minister of Finance, an unguided wide discretion to prescribe age limits in relation to all the grants in the Act. Thus, except for defining a child 'as a person under 18 years of age' in the definition section, the Act does not provide any guidance to the Ministers on the factors they should take into account in considering the age limit. This construction has been interpreted by the Ministers to confer on them the authority to limit the age to 15 years[95].

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[93] [B57-2003]

[94] See S Giese 'CI submission to the Portfolio Committee on Social Development on the Social Assistance Bill with a special focus on meeting the needs of children in the context of HIV/AIDS' September 2003; S Rosa, I Frye and P Proudlock 'Joint submission to Parliament on the Social Assistance Amendment Bill (2003)' On behalf of ACESS, CI, NEHAWU, Black Sash, SACC, SACBC, Community Law Centre, Nadel, Rapcan, Women's Legal Centre, and TAC.

[95] The applicant in *Mahlangu* has argued against this interpretation by the Ministers

4.2.4 Litigation for the final extension to 18 years

In 2005 legal proceedings were initiated to challenge the administrative problems with the phased extension and to ask the court to declare the age limit of 14 years unconstitutional.

The applicant is Florence Mahlangu,[96] who lives in Ga-Motle Village in the North West Province. Mrs Mahlangu has 3 children who are now aged 21, 16, and 14. At the time the application was launched, the children were younger and she was employed as a domestic worker. Her income fluctuated due to the casual nature of her employment as a domestic worker but never exceeded R1000 per month. Her husband was unemployed and had been so for 7 years. Mrs Mahlangu was therefore the sole provider for her family. She used her income to pay for all the household expenses including water, electricity, transport, food and school fees of R225 per month for her disabled daughter to attend a special school.

In 2008 by the time the case reached the Court, Mrs Mahlangu's circumstances had changed for the better: her husband had found a permanent job as a bus driver and their joint income is now above the CSG means test threshold. They therefore no longer qualify for the CSG. But Mrs Mahlangu is still pursuing the case in the interests of the public and on behalf of the 2 million poor children who are still excluded due to the age threshold of 15 years.[97]

Meanwhile, before the case reached the Court in March 2008, the ANC recommended at the ANC National Conference in December 2007 that the

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[96] Mrs Mahlangu sought the help of the CI in 2005. The CI provided para-legal assistance and then referred the matter to the public interest law firm, the Legal Resources Centre, for legal proceedings to be instituted. By the time the case reached the court (March 2008), the phased in extension had finished and this leg of the case fell away leaving the leg that was calling for the extension to 18 years.

[97] Mrs Mahlangu is being supported by her lawyers, the Legal Resources Centre and a number of civil society organisations who work on children's rights including the CI and the Centre for Actuarial Research (CARE), both at UCT, the Black Sash and ACESS.

CSG should be gradually extended to 18 years. In February 2008 the Minister of SD stated publicly that the grant would be extended gradually to 18 and that the Minister of Finance would provide the details of the phased extension.[98] However, the Minister of Finance in his budget speech in February 2008 announced that the grant would be extended only to age 15 years as of 1 January 2009 and he gave no promise or commitment for further extensions.[99] The decision was promulgated in the 2008 regulations[100] in August 2008. The regulations were not published for comment prior to finalisation hence there was no formal process for the public to express their concerns with the limitation to 15 years.

In March 2008 the Minister of Finance opposed the *Mahlangu* case arguing against the extension to 18. The Minister did not argue that there were insufficient resources available. He argued rather that there are finite resources and that these have to be shared between a number of competing social policies.

> "State organs have the duty in terms of section 7 of the Constitution to respect, protect, promote and fulfill all rights in the Bill of Rights. It cannot focus on one socio-economic right to the detriment of others, nor can it focus on one group within society to the detriment of others. Despite the revenue surpluses referred to by Ms Budlender in her affidavit in reply, there are still finite resources and the state has to balance how it allocates these resources. The State would be acting against its obligations if, because of a disproportionate allocation in one sphere, it is found wanting in another,..."[101]

The Minister of Finance argued further that he was not yet convinced that the CSG was the appropriate policy intervention for older children[102] and that 'vocational training'[103] may be a more appropriate policy intervention. He

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[98] Minister of Social Development *Social Cluster Media Briefing* Parliament 14 February 2008 (witnessed by the author)
[99] Minister of Finance *Budget Speech* 20 February 2008.
[100] Social Assistance Act 13 of 2004: *Regulations*. GNR 898 in GG 31356 of 22 August 2008
[101] Para 29 of Heads of Argument for the Minister of Finance in *Mahlangu*.
[102] Ibid paras 19 and 20
[103] Ibid para 21

further argued that the policy choices as to what measure to provide to give effect to the matrix of socio-economic rights should be made by the Executive and that '[i]t is not the role of the court to second-guess complex matters of policy'.[104]

The Applicant argued in response to the allegation that the extension of the CSG to older children would result in a disproportionate allocation to one group - that the CSG only makes up 31% of the total social security budget and that the extension would bring this to 37%. She argued that this was not unreasonable if one considers the fact that children make up 38.5% of the total population, are unable to provide income for themselves, and are a constitutionally protected vulnerable group.[105]

In response to the argument that the State sees the group of socio-economic rights as a matrix - the Applicant argued that the Bill of Rights expressly names each individual socio-economic right and requires the State to have a plan and measures aimed at giving effect to each right.[106] Section 27 (3) provides that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.' When faced with a challenge on the right to social security the State cannot therefore argue that it has chosen rather to spend the money on the right to health or education instead. It is obliged constitutionally to progressively give effect to all the rights. While this does not mean it has to do so immediately, it must at least have a plan to reach all people in need and must make reasonable progress in implementing the plan. The applicant argued further that the Bill of Rights expressly lists 'social assistance' as one of the measures that the State must take to give effect to the right to social security and that if the State has adopted a measure to give effect to the social assistance rights of children i.e. the CSG, it cannot

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[104] Ibid para 33
[105] Budlender D Draft Supplementary Affidavit in *Mahlangu*
[106] Applicant's Supplementary Heads of Argument in *Mahlangu* March 2008

discriminate against older children by withholding that measure from them. Such discrimination amounts to a violation of the right to equality in s9 of the Bill of Rights

In response to the Minister's preference for vocational training or other non-social assistance programmes for older children, the Applicant emphasised to the court the importance of recognising the ability of the cash grant to help realise the child's other rights: without cash the child's caregiver would not be able to afford the costs of transport to attend the vocational training, the costs of school uniforms and stationery, or the costs of feeding the child to ensure she or he is able to concentrate during school or vocational training.[107]

At the date of publication of this dissertation, judgment in the case was still pending. Informal communication between ACESS and the ANC leadership provided information that the ANC intended to announce each yearly extension in the annual budget speech but not to commit in law to the full extension.[108] On 5 February 2009 the President announced in his State of the Nation Address that – 'government will sustain and expand social expenditure, including progressively extending access to the child support grant to children of 18 years of age ....'.[109] However, the Minister of Finance then contradicted the President's commitment by saying in his Budget Speech on 11 February 2009 that 'consideration is being given, subject to affordability, to the extension of the child support grant to the age of 18.' [110]

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[107] Oral argument that was presented in court and witnessed by the author

[108] Minutes of the CSG Advocacy Strategy Group 13 January 2009 (On file with the author) and see also 'Social grants: child grants are an affordable way to fight poverty' *ANC Today* 30 January 2009 where the timetable for the extension is set out with the starting date for the first extension to children under 16 years being 1 April 2009.

[109] President's *State of the Nation Address to Parliament* 5 February 2009 page 14

[110] Minister of Finance *Budget Speech* 11 February 2009 page 16

4.3 Income threshold

In 1998 the income test threshold was set at R800 or R1100 per month depending on urban or rural location and type of dwelling. Ten years later in 2008 the levels had not been adjusted with inflation despite all other grant's income test thresholds being adjusted annually. Civil society first raised this concern in 2001 and continued until 2008 to do research to prove the problems and advocacy to bring the problem to government's attention.

The Minister of SD finally acknowledged the problem in 2007 when research that it had commissioned from the Economic Policy Research Institute advised that the threshold should be raised to match inflation erosion over the ten years. At this point in the campaign it became a question of creating pressure to ensure the reform happened sooner rather than later.

In February 2008 a High Court case *(Ncamile)* was initiated to create pressure for reform. Speeches by the Ministers of SD and Finance in February 2008[111] and draft regulations released in May 2008 through the legal proceedings indicated that Cabinet recognised the problem and that reform was on its way. By August 2008 the new regulations were promulgated and the income threshold appropriately adjusted through the introduction of a formula based on the grant amount. Application of the formula resulted in a threshold of R2200/month which compensated for ten years of inflation. The new formula ensures that as the amount of the grant is adjusted with inflation each year, so the income threshold is also adjusted. It is currently R2400 per month for a single person and R4800 for a couple.

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[111] Minister of Social Development *Social Cluster Media Briefing* Parliament 14 February 2008 and Minister of Finance Budget Speech 20 February 2008

4.3.1 The problem is brought to the Minister's attention

In 2000, CI together with Black Sash compiled an Issue Paper for the Committee of Inquiry. The fact that the means test income threshold was very low, and therefore excluded many low income households, was raised as a concern and it was recommended that the threshold be raised to at least R1500.[112] In 2001 The Committee of Inquiry recommended in their Report that the various means tests being used for the different grants and other components of the social security system should be rationalised in order to ensure fairness.[113] These recommendations were not followed by Cabinet.

In March 2001 government published draft regulations for comment.[114] The regulations proposed a number of amendments including minor amendments to aspects of the means test; however they did not propose to adjust the income threshold. An adjustment to the income threshold was therefore not officially on the table for consideration. However, the CI used this opportunity to bring the income threshold problem to the Minister's attention by writing a submission which pointed out that '[t]he amount of R9600 / R13200 per annum has not been increased since 1998 while in real terms the buying power of this amount has decreased substantially' and recommended that the means test should be determined using an objective poverty measure and should be increased annually in line with inflation.[115] In November 2001 the regulations were finalised[116] but the income threshold was not adjusted.

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[112] (fn 79) Pages 18 – 19.
[113] ibid
[114] Social Assistance Act 59 of 1992: Amendment: Draft Regulations. GNR254 in GG 22148 of 23 March 2001
[115] S Giese 'CI comments on the proposed amendments to the regulations of the Social Assistance Act (59 of 1992) GG No. 22148 of 23 March 2001. Special focus on children affected by HIV' April 2001 Pages 6 and 23 – 24.
[116] Social Assistance Act 59 of 1992: *Amendment: Regulations*. GNR1233 in GG 22852 of 23 November 2001

4.3.2 The problem is brought to Parliament's attention

In September 2003 Parliament called for submissions on the Social Assistance Bill[117]. The Children's Institute, together with a number of other organisations from civil society, made presentations at the public hearings in September 2003. In the joint submission, the problems with the means test income threshold were brought to Parliament's attention.[118] At this juncture, Parliament was advised to and could have amended the Bill so as to provide guidance to the Executive when making decisions on the income threshold so as to guard against unconstitutional limitations of children's rights. However, the Bill was passed by Parliament in late 2003 without this area of concern being addressed[119].

4.3.3 Evidence on the extent of the problem

In the hope that new evidence would persuade the govemment of the need for reform, the CI turned its attention to further research to demonstrate the extent of the problem. A research report that included calculations to determine the number and proportion of children eligible for the CSG at an inflation-adjusted income threshold was produced.[120] This report showed that if the means test threshold was adjusted with inflation in 2005 approximately 500 000 more children would be eligible for the CSG. The report was widely distributed to government officials, including office bearers in the Departments of Social Development and Finance. It was also distributed to members of parliament.

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[117] [B57-2003]
[118] S Rosa et al 'Joint submission to Parliament on the Social Assistance Amendment Bill (2003)' On behalf of ACESS, CI, NEHAWU, Black Sash, SACC, SACBC, Community Law Centre, Nadel, Rapcan, Women's Legal Centre, TAC Page 7.
[119] [B57D-2003]
[120] (fn 55)

In 2006 the Department of Social Development commissioned the CI to do a literature study to provide the Department with a comprehensive overview of all evidence on the CSG.[121] The problems with the static means test income threshold were again brought to the Department's attention and the study recommended that the 'means test be reviewed so that its thresholds are at least brought in line with inflation since 1998, or scrapped altogether'.[122]

The CI also initiated a large research project on the targeting mechanisms for the various poverty alleviation programmes including the CSG. This research project, called 'The Means to Live' demonstrated the problems with the static income threshold of the CSG. The research findings and recommendations were published in the CI's 2006 South African Child Gauge[123] and 3500 copies were printed and distributed to all relevant government officials and members of parliament. The research was also presented orally to the Department of Social Development and discussed with high-ranking officials of the Department on a number of occasions.[124] Media advocacy resulted in a

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[121] A Leatt and D Budlender 'Literature study to motivate for the extension of child support grants (CSG) to the age of 18 years' Commissioned by the Department of Social Development Children's Institute and Centre for Actuarial Research, University of Cape Town May 2006.

[122] Ibid pages 5, 6, 33 - 39

[123] J Monson and K Hall et al (eds)*South African Child Gauge 2006* (2006) Children's Institute University of Cape Town

[124] K Hall 'Targeting Child Poverty in South Africa: An Inclusionary Approach' Paper presented at the Department of Social Development's Symposium on Child Poverty (May 2007) Sandton Convention Centre. (About 200 delegates were present at this symposium including senior officials from the Department of Social Development)

K Hall K Meeting with Deputy Director General of Comprehensive Social Security (Selwyn Jehoma) May 2007 Pretoria.

K Hall 'Where to Draw the Line? Targeting and leakage in the Child Support Grant' Paper presented at the First Annual Charlotte Manye Maxeke Conference on the Economics of Social Protection Hosted by the National Department of Social Development and Department of Economics, University of Pretoria June 2007 (The Minister of SD and high ranking Departmental officials and representatives from the National Treasury and SASSA were in attendance).

K Hall 'Presentation of Means to Live research' at a round table workshop convened by the CI September 2007, CSIR Convention Centre Pretoria (The Director General and Deputy Director General for Comprehensive Social Security were present at the roundtable).

number of newspaper articles highlighting the problems with the static income threshold of the CSG.[125]

4.3.4 The Minister of Social Development recognises the problem

In late 2007, research done by the Economic Policy Research Institute (EPRI) that was commissioned by the Department, confirmed the problem and recommended a new threshold that kept pace with inflation. After seven years of research and advocacy, the Department was finally convinced of the need for reform. It then became a question of how and when, and whether the Minister of Finance would give concurrence.

4.3.5 Litigation to ensure the reform is not delayed

In November 2007, Mrs Ncamile approached the Legal Resources Centre (LRC) in Grahamstown for legal help. Mrs Ncamile was caring for her 11 year old grandson (Juan) and needed the CSG to pay for his basic needs. She had started receiving a CSG for Juan in March 2006; however it was stopped in August 2007 when the Social Security Agency found out that Mrs Ncamile's husband received a small monthly private pension of R1512. The spouse's income is included in the means test threshold calculations and Mrs Ncamile therefore fell over the means test income threshold of R1100 despite being in desperate need of the grant. If the income threshold had been increased with inflation since 1998 it would have been at R2100 in 2007 and Mrs Ncamile would have qualified despite her spouse's income being included. Mrs Ncamile was therefore being discriminated against partly due to a failure by government to prevent the income threshold from being eroded

[125] 'Researchers question child grant system' *Independent Online* 02/02/2007; 'Inflation pushes more children out of support grant net' *Saturday Argus* 03/02/2007; 'Child grant system needs change – researchers' *Business Day* 05/02/2007; 'Lower the barrier for child grant' *Business Day* 06/02/2007; 'Means test out of date' *Daily Sun* 05/02/2007; 'Report slams grant means test' *The Citizen* 05/02/2007; 'Red tape ties up child support grants' *Pretoria News* 8/11/2007; 'Families lose out on child grants' *Cape Argus* 07/11/2007.

by inflation, and partly by the inclusion of her spouse's income in the means test calculation (Mr Ncamile was not Juan's biological grandfather and refused to contribute to Juan's material needs).

The LRC asked the CI to be the second applicant in the case as they predicted that the Department of Social Development would offer Mrs Ncamile a settlement and the case would end without a precedent being set for the many other caregivers in a similar situation.

The applicants argued that the regulations to the Social Assistance Act were flawed because the income threshold of R1100 was set in 1998 and had not been adjusted for inflation since then. However, the income thresholds for all the other social grants had been adjusted annually. The result was a retrogressive measure that in 2005 had excluded more than 500 000 children under 14 years[126] and that could be estimated to be excluding approximately 700 000 children under 15 years in 2008.[127]

The case started in February 2008 with an exchange of legal proceedings between the Applicants and the State (Minister of SD and the Minister of Finance). As predicted, the Minister of SD settled with Mrs Ncamile despite the fact that he had to bend the law to give her the grant. This settlement represented an acknowledgement by the Minister of the flaws in the means test but did not yet result in a systemic remedy for the many other caregivers in a similar position. The case was continued by the CI in order to create pressure for the necessary amendments to the regulations to be made as soon as possible. The Minister of Finance filed an answering affidavit opposing the relief that the CI was seeking. In contrast, the Minister of SD

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[126] (fn 55).
[127] (fn 57)

sent a letter saying that he recognised the problem and intended to address it by amending the regulations. In May he applied for and was granted a postponement in order to finalise the new regulations.

The problem that the Minister of SD faced was that according to the Social Assistance Act he needed the concurrence of the Minister of Finance to make the amendment to the income threshold.

In opposing the case, the Director General (DG) of Finance raised similar arguments to the ones that had been raised by the Minister of Finance in the *Mahlangu* case.

> 'The budget process forces a choice between competing views, perspectives and interests, which choice is based on the policies determined by an elected executive, guided by the Constitution. The Constitutional challenge of meeting the basic needs of South African children is but one of the priorities which must be balanced in these policy choices.
>
> The subject of the Child Support Grant ("CSG") falls, as does all social assistance, within the realm of policy that ought to be decided by Cabinet.'[128]

He proceeded to list a range of social programmes aimed at giving effect to other socio-economic rights that the budget also needed to prioritise eg the school feeding scheme, no-fee schools, free water and electricity, housing and social welfare services. He put forward the matrix of rights argument that was also used in the *Mahlangu* case by saying that:

> 'It is intended that there will eventually be further progressive realisation of the rights of children to social security, which includes realisation of those rights for children up to the age of 18 years. However this does not manifest solely in the CSG itself, but in a wide

[128]Fourth respondent's (Minister of Finance) answering affidavit *in Ncamile* Par 20 and 21

> array of Social and Economic Development Services outlined above.'[129]

He assured the court that a decision on the means test would be made during the next financial year (2009/10). He did not however give a commitment that the intention was to address the problems in the income threshold, but merely that a decision whether or not to change the income threshold, would be taken.

4.3.6 New regulations addressing the problem are promulgated

Aided by the pressure of the court case, new regulations were promulgated on 22 August 2008.[130] The regulations increased the income threshold from R800 and R1100 per month to a formula that produced a value of R2200 per month. The threshold formula includes the value of the grant as a component of the formula therefore as the value of the grant is adjusted annually to keep pace with inflation so the income threshold will also automatically adjust each year.[131] As the relief that the CI had sought out to achieve had been substantially achieved, the case was withdrawn.

Due to the reform to the income threshold, an estimated additional 987 000 poor children under 15 years are now eligible for the CSG.[132] However, if Parliament and the Executive had been pro-active in guarding against the erosion of the income threshold, many more children would have benefited sooner.

I now turn to examine the constitutional provisions and case law relevant to the central question of this dissertation.

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[129] Ibid Par 67

[130] Social Assistance Act 13 of 2004: *Regulations*. GNR 898 in GG 31356 of 22 August 2008

[131] The grant amount was adjusted in October 2008 and February 2009 and the income threshold is now R2400 per month for a single caregiver and R4800 for a couple.

[132] See the Department of Social Development's presentation to the Portfolio Committee on 25 June 2008 www.pmg.org.za

Chapter 5 - Analysis of the Constitution and case law

The Constitution does not contain any express provisions which directly answer the question of whether Parliament can delegate its law-making function to the Executive. The Constitution also does not expressly say what types of law-making functions can or cannot be delegated or how the decisions should be delegated. The answers lie in the interpretation of a number of constitutional principles and provisions. Some of these provisions have been interpreted by the Constitutional Court (the Court) and this case law provides a definitive answer of yes for the first question. The case law also provides some guidance on the type of decisions that can be delegated and on how the decisions should be delegated.

Two recent judgments on the legislatures' obligation to facilitate public involvement in its law-making processes introduce a new variable into the equation by decisively interpreting South Africa's form of democracy as both representative and participatory. The Court's recognition of the constitutional obligation on Parliament to facilitate public participation in its law-making processes and the Court's robust approach to invalidating national Acts of Parliament that have been passed without this obligation being fulfilled, juxtaposed with the weak protections afforded to public participation in the regulation-making processes, raises a question on the disparity in protection of the right to participation in the making of Acts of Parliament versus regulations. This disparity also highlights the importance of clearly defining what types of decisions Parliament can delegate because a delegation of a decision to be made in regulations can deprive the decision of the comparatively stronger procedural protection afforded to decisions made by Parliament itself.

The particular facts and nature of the CSG delegations throw up a number of complex variables that need to be recognised. These variables have not been

present in this combination in the preceding case law. Firstly, the fact that the CSG is a grant for children invokes children's rights in section 28 of the Constitution and the principle of the paramountcy of the best interests of the child. The fact that the decisions impact on children also heightens the importance of the constitutional principle of participatory democracy due to children's exclusion from the system of representative democracy (children cannot vote).

Secondly, the CSG is social assistance which means we enter the terrain of socio-economic rights which brings with it the negative obligation not to take retrogressive measures and the positive obligation to take reasonable measures within available resources to achieve progressive realisation.

Thirdly, the age limit of 15 years discriminates against older children who are also predominantly poor Black children and therefore the right to equal benefit of the law and the prohibition against discrimination on the basis of age and race is invoked. Because the right to equality is being invoked, the general test for the limitation of rights in s36 becomes relevant and the limitation to age 15 must therefore satisfy the test of a 'law of general application' that is 'justifiable and reasonable in an open and democratic society based on dignity, equality and freedom'. While the Court will apply the Grootboom reasonableness test for socio-economic rights, the violation of the rights to equality will be considered as an important factor in determining reasonableness.[133]

A fourth important variable to consider is that social assistance law falls into schedule 4 of the Constitution which means that the National Council of

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[133] See *Khosa and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) paras 44 – 45 where the violation of the right to dignity played a significant role in the court finding that the lack of access to social grants for refugees failed the *Grootboom* reasonableness test and S Liebenberg and B Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *SAJHR* at 335

Provinces (NCOP) and provincial legislatures should participate actively in any law-making process that is concerned with social assistance.

After analysing the literature, case law and the particular nature of the CSG delegations, I have identified the following constitutional principles and provisions as relevant to the central question of this dissertation.

With respect to Parliament's role as legislator, the most relevant provisions are:[134]

- s43(1) with vests the national legislative authority in Parliament,
- s42(1) and (2) which provide that Parliament consists of the National Assembly (NA) and the National Council of Provinces (NCOP) and that both houses must participate in the legislative process,
- s42 (3) and (4) which elaborate on the purpose of national Parliament in South Africa's particular form of constitutional democracy, and the specific roles of the NA and NCOP,
- s44 which details what Parliament's legislative authority entails,
- s57(1) (b) and 70(1) (b) which oblige Parliament to exercise its legislative authority with due consideration to representative and participatory democracy, accountability, transparency and public involvement,
- s59 and s72 which oblige Parliament to facilitate public involvement in its legislative processes, and
- s73 to 79, and s65(2) which describe in detail the procedure that Parliament must follow for the different types of bills, in particular s76 and s65(2) which describe the participation of the NCOP and the provincial legislatures in bills that affect the provinces (ie bills legislating on matters that fall into schedule 4 of the Constitution).

[134] These provisions are replicated for national, provincial and local legislatures. I refer here only to the provisions that apply to the national parliament as the Social Assistance Act of 2004 is an Act of national parliament.

These provisions need to be interpreted in the context of the Constitution as a whole with particular reference to the constitutional principles of separation of powers, democratic government, and social justice and the advancement of fundamental rights and freedoms.

The obligations imposed on Parliament by the Bill of Rights are also particularly relevant. These include:

- s7(2) and 8(1) which place an obligation on Parliament to promote, respect, protect and fulfill the rights in the Bill of Rights,
- s9 which guarantees everyone the right to equal protection and benefit of the law, and prohibits unfair discrimination on the basis of race or age,
- s27(1) which guarantees everyone the right to have access to social security, including social assistance, and s27(2) which places a positive obligation on the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right,
- s29 which guarantees everyone the right to basic education,
- s28(1) which gives all children the rights to basic health care services, basic nutrition, social services, shelter, protection from abuse and neglect, and protection from child labour,
- s28(2) which obliges Parliament to give paramountcy to the best interests of children,
- s28(3) which defines a child as a person under 18 years of age,
- s36 which allows the state to limit rights but only by law of general application and only if reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and
- s39 which obliges the court to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation.

I now endeavour to analyse some of these provisions and the case law interpreting them by asking a series of questions. I apply this analysis to the facts of the CSG delegations.

5.1 Why does the Constitution vest the legislative function in Parliament?

Section 43 of the Constitution vests the legislative authority of the national sphere of government in national Parliament. While Section 85(1) (d) confers on the national executive the authority to prepare and initiate legislation, this power is not held exclusively by the Executive but is also conferred on Parliament by ss 55(1)(b) and 68(1) (b). The ultimate authority to consider, pass, amend or reject any law therefore lies with Parliament.[135]

When we raise the question whether and to what extent Parliament can delegate its legislative authority, we need to re-visit the fundamental reason why the Constitution vests the law-making authority in Parliament. Section 42(3) provides: 'The National Assembly is elected to *represent the people and to ensure government by the people* under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, *by passing legislation* and by *scrutinising and overseeing executive action*.' (italicised for emphasis). Section 42(4) is similar but relates to the role of the NCOP as the house responsible for representing the interests of the provinces. Essentially what sections 42(3) and (4) are saying is that in order to ensure government by the people and to ensure that the interests of the people in general, and the interests of the people in the different provinces in particular, are represented and involved in government, Parliament should make the laws. This recognises that if the laws were made by the Executive or by the Judiciary, then the elements of representivity and government by the people would be missing.

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[135] s 43 read with ss 44, 55(1) (a) and 68(1)(a)

In *Executive Council of the Western Cape Legislature*[136] Sachs J refers to the fundamental purpose of Parliament in a democracy as the underlying reason why the legislative authority is vested in Parliament:

> 'The reason why full legislative authority, within the constitutional framework..., is entrusted to Parliament and Parliament alone, would seem to be that the procedures for open debate subject to ongoing press and public criticism, the visibility of the decision-making process, the involvement of civil society in relation to committee hearings, and the pluralistic interaction between different viewpoints which Parliamentary procedure promotes, are regarded as essential features of the open and democratic society contemplated by the Constitution. It is Parliament's function and responsibility to deal with the broad and controversial questions of legislative policy according to these processes.'[137]

Section 44(1) describes what this legislative authority entails, namely the power (i) to amend the Constitution, (ii) to pass legislation with regard to any matter, and (iii) to assign any of its legislative powers, excluding the power to amend the Constitution, to any legislative body (ie to the provincial parliaments or local government councils). It is clear from these provisions that Parliament can legislate on 'any matter'. Parliament's only constraint is section 44(4) which obliges it to act in accordance with, and within the limits of, the Constitution.

Moving from this point it is relevant to now ask whether the Constitution allows Parliament to delegate its law-making powers to the Executive.

5.2 Does the Constitution allow Parliament to delegate authority to the Executive to make regulations?

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[136] 1995 (10) BCLR 1289 (CC)
[137] Ibid para 205

The principle of separation of powers and the provisions in chapter 4 of the Constitution which elaborate on Parliament's role and functions are most relevant for answering this question.

While the Constitution does not expressly refer to the principle of separation of powers, the principle has been interpreted by the Court as one of the founding principles of the Constitution.[138] It manifests firstly in the Constitution's allocation of the legislative, executive and judicial functions to the legislature, executive and judiciary respectively[139] and secondly in a range of checks and balances aimed at ensuring accountability, responsiveness and openness. South Africa's system of separation of powers does not ensure an absolute separation of functions and in a number of areas two arms of government may share a function, or members of one may also be members of another. For example, there is a sharing of members between the Executive and Legislature because Cabinet Ministers must also be members of the Legislature.[140]

The test to assess whether the principle of separation of powers has been infringed is essentially an assessment of whether there is an over-concentration of power in one arm of government.[141] An over-concentration of

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[138] The principle was listed in the Interim Constitution as one of the principles that the drafters of the final Constitution were obliged to adhere to. The principle was defined as 'a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'. In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) the Constitutional Court certified that the final Constitution did give expression to the principle of separation of powers (paras 106 – 113). In *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) the Court held that there was no doubt that the Constitution provides for a separation of powers (paras 18 – 22).

[139] Ss 43, 85, 125, and 165

[140] In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) paras 106 -113 the Court found that the fact that Cabinet members also hold seats in Parliament does not violate the principle of separation of powers. They expressed the view that there were sufficient checks and balances to guard against an abuse of power and that the presence of the ministers in Parliament strengthens the accountability of the Executive to the Legislature.

[141] See *S v Dodo* 2001 (5) BCLR 423 (CC) para 16: 'This Court has therefore clearly enunciated that the separation of powers under our Constitution – ....embodies a system of checks and balances designed to prevent an over-concentration of power in any one arm of government;...'.

power can exist if an arm of government has taken on a function that clearly belongs exclusively to another[142] or if the necessary checks and balances to prevent an over-concentration of power are absent.[143] I also argue that an over-concentration of power will occur if the checks and balances are not working as they should – ie are not effective. I will substantiate this point later on when I elaborate on how the provisions of PAJA that are supposed to protect the public's right to participate in regulation-making processes did not effectively do so in the case of the CSG regulations. In this case the check and balance was either absent or not working effectively and the result was that there was an over-concentration of power in the Executive.

The lines of separation of functions between the Executive and Legislature are considerably blurred in the area of subordinate legislation. The mere act of delegation of legislative authority is an infringement of the pure concept of separation of powers. In the USA where there is a strict separation between the Executive and Legislature a distinction is drawn between the delegation of the function to make law versus the delegation of the function to execute the law. The latter is allowed while the former is not.[144] In Ireland, the principles and policy test is used by the court to assess whether a delegation is constitutional. This test allows matters of detail to be delegated to the Executive while matters of policy and principle must be set by Parliament in the principal Act. The essential question is:

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[142] As happened in *Executive Council of the Western Cape Legislature* 1995(10) BCLR 1289 (CC) when Parliament's delegation to the President of the authority to amend or repeal an Act of Parliament was found to be unconstitutional. The power or repeal or amend an Act is a power that only Parliament may exercise.

[143] See *Dawood and Another* 2000 (3) SA 936 (CC) para 50 and 63. The Court found that while Parliament may delegate authority to an executive official to make decisions about whether or not to grant a temporary residence permit, it must ensure that the delegation is guided by clear principles in the Act of Parliament so as to guard against a potential unconstitutional limitation of rights. Clear principles to guide the exercise of the discretion, is the necessary check or balance that was required in this instance, and that was found to be absent by the Court.

[144] The distinction was first articulated by Ranney J in *Wilmington and Zanesville Railroad Co. v Commissioners*, 1 Ohio St. 77 (1852): 'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." Referenced from *Executive Council of the Western Cape Legislature (1995)* para 53

> 'whether what is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorized, for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power.'[145]

The USA case law has played a role in the development of the Irish test,[146] however the wording of article 15.2.1 in the Irish Constitution, which gives the Oireachtas the 'sole and exclusive power of making laws for the State' has also been significant.[147]

In *Executive Council of the Western Cape*[148] Chaskalson J, representing the majority of the Court provides a concise history of Parliament's power to delegate but concludes by drawing attention to the change that was brought about by the adoption of the Constitution as the supreme law of the country. While South Africa had a history of Parliamentary supremacy, a precedent of delegation, and many comparative countries' jurisprudence to draw on for authority to support delegation – the ultimate question is whether the Constitution allows Parliament to delegate.

While not yet faced directly with a question on whether a particular delegation by Parliament of its law-making powers to the Executive *to make regulations* is constitutional, the Court has ruled that under the Constitution, Parliament does have the authority to delegate 'sub-ordinate regulatory authority' to the Executive.

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[145] *Cityview Press Ltd v An Chomhairle Oiliuna* [1980] IR 381
[146] 1995(10) BCLR 1289 (CC) para 53
[147] *Lexis Nexis Butterworths* (2003) See pages 4.2.09 – 4.2.50 for a comprehensive account of the case law on delegation of subordinate regulatory authority in Ireland.
[148] 1995(10) BCLR 1289 (CC)

> 'The legislative authority vested in Parliament under section 37 of the Constitution is expressed in wide terms - "to make laws for the Republic in accordance with this Constitution." In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies.' [149]

This principle has been confirmed in relation to the final Constitution in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another.*[150]

The answer to the question posed as a heading to this section is therefore – yes – the Constitution does allow Parliament to delegate authority to the Executive to make regulations. Therefore in terms of the Social Assistance Act, Parliament's delegation to the Executive to make regulations on social grants is allowed. However, I now turn to look at whether there is guidance from the Court on what types of decisions can be delegated to be made in regulations and how these delegations should be circumscribed.

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[149] *Executive Council of the Western Cape Legislature (1995)* Para 51

[150] 2000 (1) SA 661 (CC) Para 124 per Ncgobo J: 'delegation short of "plenary legislative power" is possible'.

5.3 What guidance does the Constitution provide on what types of decisions Parliament can delegate and on how the delegations should be made?

5.3.1 Parliament may not delegate its plenary powers to amend or repeal laws

Parliament may not delegate its plenary powers to amend or repeal laws because this would subvert the manner and form provisions of the Constitution that govern the legislative process.

> 'In paragraph [51] of this judgment I pointed out why it is a necessary implication of the Constitution that Parliament should have the power to delegate subordinate legislative powers to the executive. To do so is not inconsistent with the Constitution; on the contrary it is necessary to give efficacy to the primary legislative power that Parliament enjoys. But to delegate to the executive the power to amend or repeal Acts of Parliament is quite different. To hold that such power exists by necessary implication from the terms of the Constitution could be subversive of the "manner and form" provisions of sections 59, 60 and 61. Those provisions are not merely directory. They prescribe how laws are to be made and changed and are part of a scheme which guarantees the participation of both houses in the exercise of the legislative authority vested in Parliament under the Constitution,...'[151]

Does the delegation of a decision such as the age limit for the CSG, to the Executive to make in regulations, also possibly result in a subversion of the manner and form provisions of the parliamentary legislative process? When a decision is delegated to the Executive to make in regulations, the procedural protection of the manner and form provisions of Chapter 4 of the Constitution are absent. Some procedural protection for the regulation-making process does exist in PAJA, however the protection is comparatively weaker then that provided by the open and deliberative nature of the parliamentary process. For this reason there must be some limit on the types of decisions that Parliament can delegate.

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[151] *Executive Council of the Western Cape Legislature* (1995) Para 62 per Chaskalson J

It is important to remember the rationale behind the inclusion of the manner and form provisions in Chapter 4 of the Constitution in order to grasp the constitutional dilemma that arises when decisions such as the age limit and income threshold for the CSG are delegated by Parliament. The parliamentary law-making manner and form provisions are aimed at ensuring:

(i) open public deliberation and decision-making by a collective of 490 elected representatives of the people, or as the Constitution says in s42 - 'government by the people'
(ii) direct public participation through public hearings and public access to parliamentary committee deliberations,[152] and
(iii) representation of provincial interests by the participation of the NCOP and the provincial legislatures in national laws dealing with schedule 4 matters (social assistance legislation is a schedule 4 matter and is passed according to a s76 procedure).

Instead of the above strong procedural protections enjoyed by the principal law, if a decision on legislative policy is delegated to the Executive to make in regulations, the procedural protection is much weaker. This weakness is caused by the ambiguous nature of section 4 of PAJA, and the Executive's tendency not to promote public participation as illustrated in the case of the CSG regulations. The case law on participation in regulation-making also does not encourage Executive compliance with procedural fairness.

I illustrate below the difference between the procedural protections afforded to a principal law versus regulations:

(i) While the Minister needs to sign off the regulations, the whole process is likely be managed by an unelected civil servant, or a team of civil

[152] See ss 57(1) (b), 59, 70(1) (b), and 72

servants[153] behind closed doors. The final decision will be made by one (sometimes two) Executive Cabinet Minister. In the case of the CSG, the Minister of Finance effectively has a veto power that is divorced of the consultative process.

Contrast this with decision-making on the principal law where the entire process is open to the public, managed and deliberated on by an assembly of elected members of parliament in public, and the final decision is taken by 490 members of Parliament.

(ii) The provisions in PAJA that govern public participation do not provide a guarantee of public participation in regulation-making processes. Hoexter refers to section 4 of PAJA as 'a somewhat enigmatic provision'[154] and says further that '[w]hen one considers the generous allowance already made for exemptions and variations in s 2, the provisions of s 4 begin to seem exaggerated in their denial of any enforceable duty to follow fair procedures. It is hoped that the attitude of the legislature does not rub off on administrators'.[155] In the case of the CSG regulations, the attitude of the legislature does appear to have rubbed off on the administrators.

The case law on the topic is also not very encouraging which gives the Executive further license not to take public participation seriously. In *Minister of Home Affairs v Eisenberg and Associates: In re Eisenberg and Associates v Minister of Home Affairs*[156] the respondent did not rely directly on s 4 of PAJA but raised it in support of its interpretation of s 7 of the Immigration Act, which required public participation to be followed in the making of the regulations under the Immigration Act. Chaskalson J did not pronounce on whether s 4 of PAJA was applicable to the case but he

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[153] See Hoexter page 24
[154] Ibid Page 364
[155] Ibid Page 370
[156] 2003 (5) SA 281 (CC)

did find that if s 4(1) of PAJA had been applicable, it would have been reasonable and justifiable for the Minister to depart from the stipulated notice and comment procedure because in the circumstances there would have been insufficient time to engage in the participation process in time for the regulations to be finalised before the Act came into effect.[157]

However, he seems to have not taken cognizance of the important fact that the Department had actually had a year between the passage of the Act by Parliament and the date of commencement, in which to fulfil the requirements of at least a notice and comment procedure. It was the Department's own fault that it now found itself without sufficient time to provide for public participation. If a Department's own bad time management is allowed to suffice as a justifiable reason for departing from the public participation requirements of section 4 then section 4 is likely to be ignored by administrators.

In *Chairperson's Association v Minister of Arts and Culture*[158] Legodi J said that '[t]he Court will always be reluctant to invalidate administrative action on procedural grounds and has in this context frequently indicated the importance of not impeding the efficacy of government'.[159]

Contrast this case law on PAJA with the case law on public participation in the legislative processes of Parliament. In *Doctors for Life International v The Speaker of the National Assembly and Others,*[160] the Court found public participation to be a material aspect of the national parliamentary law-making process[161] and invalidated the laws concerned due to the lack of reasonable public participation. In *Matatiele Municipality v President of*

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[157] Ibid para 58
[158] 2006 (2) SA 32(T)
[159] Ibid para 37
[160] 2006 (6) SA 416 (CC)
[161] Ibid Para 209

the Republic of South Africa[162] the Court emphasised again that the legislatures have a constitutional duty to facilitate public participation in their law-making processes and that this duty is a material aspect of the law-making process and invalidated part of a national Constitution Amendment Act due to non-adherence to this duty.[163] The fact that the Court was willing to interfere in Parliament's realm and invalidate national Acts of Parliament indicates the importance with which the Court views the constitutional obligation to facilitate public involvement in law-making processes. The existence of a clear constitutional obligation on Parliament to 'facilitate public involvement'[164] aided the Court in its robust approach.

(iii) If public participation is provided in regulation-making processes it is likely to be by written notice and comment as opposed to public hearings. Contrast this with the precedent set by Parliament where public hearings are the norm when controversial matters of legislative policy are being debated.

(iv)Under PAJA there is no obligation to justify or explain the final decision taken or why the comment was or was not incorporated. Contrast this with the justifications and reasons that are given by Parliament through the dialogue opportunities that are provided by the public hearings process, and through the plenary debates on the Bill.

(v) In the regulation-making process there is no guarantee of a process to ensure that the interests of the provinces will be assessed or taken into account even though the decision falls into schedule 4 as a matter over which both the National and Provincial legislatures may legislate.

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[162] 2007(1) BCLR 47 (CC)
[163] Ibid Para 88 - 90
[164] ss 59(1) (a), 72(1) (a), and 118 (1) (a)

> Contrast this with the importance accorded to provincial participation in the parliamentary law-making process by the Court in *Doctors for Life International* and *Matatiele*. In these cases the Court found the failure of a few or even one of the 9 provincial legislatures to hold public hearings, to constitute grounds to find that the legislature had failed to fulfill its constitutional duty to facilitate public involvement in its legislative processes. Both cases were concerned with national legislation that required the involvement of the provincial legislatures and in both cases the fault lay in the lack of adequate opportunity for the public in the provinces to participate in the law-making process.

The choice on whether a decision is made by Parliament in the principal Act or by the Executive in regulations therefore holds important consequences particularly in relation to the constitutional principle of representative and participatory democracy and the separation of powers. Essentially, the delegation of a matter of legislative policy to be decided by the Executive in regulations deprives the decision of the procedural protections that the decision would have been afforded if it had been decided by Parliament itself and results in an over-concentration of power in the Executive.

There must therefore be some limit on the substance of the decisions that can be delegated. Without such limits, Parliament could essentially pass skeleton acts and delegate all the decisions to the Executive to make in regulations. This would result in a subversion of the manner and form provisions.

5.3.2 Matters of detail may be delegated to be dealt with in regulations

A limitation on the power to delegate law-making powers to the Executive can be found in the wording used by Chaskalson J in paragraph 51 of *Executive Council of the Western Cape Legislature* quoted in section 5.2 above. A close

analysis of his wording reveals that he does not say that Parliament may delegate all its law-making powers, but that Parliament may delegate 'subordinate regulatory authority' because 'detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself.'

These words imply that regulations should contain detailed provisions that are needed for the purpose of implementing or regulating the principal Act. This is close to the distinction in the USA test between the power to make law and the power to implement law. It is also close to the Irish principle and policies test.

A question arises here as to whether the age limit or the income threshold for the CSG fall into the category of 'detailed provisions.... for the purpose of implementing and regulating laws' and whether the court will consider these decisions to be matters that Parliament should not be expected to deal with itself.

Some guidance to this question can be found in the words of Sachs J's concurring judgment in *Executive Council of the Western Cape Legislature* where he essentially says that 'questions of broad and controversial legislative policy' should be decided by Parliament and therefore do not constitute detail that can be delegated.

5.3.3 Questions of broad and controversial legislative policy should be decided by Parliament

While concurring with Chaskalson J's finding in *Executive Council of the Western Cape Legislature,*[165] that Parliament may not delegate its plenary powers to amend or repeal a law, Sachs J suggested alternative reasoning

[165] (1995) ibid fn 126

for coming to the finding. He stressed the importance of considering the purpose of why Parliament is vested with the law-making function when answering the question on what law-making powers Parliament can delegate.

> 'The issue in this case is therefore not whether Parliament can find the authority to do what it did, but whether it can give away the authority which the Constitution expected it to exercise. I do not feel that the answer to this question can be found in simply distinguishing in a formal way between an Act of Parliament that extends plenary power to legislate (impermissible) and an Act of Parliament which extends power to make subordinate legislation (permissible). This will frequently be a matter of degree rather than substance. I would prefer to start my enquiry by looking at the fundamental purpose that Parliament was designed to serve. The reason why full legislative authority, within the constitutional framework mentioned above, is entrusted to Parliament and Parliament alone, would seem to be that the procedures for open debate subject to ongoing press and public criticism, the visibility of the decision-making process, the involvement of civil society in relation to committee hearings, and the pluralistic interaction between different viewpoints which Parliamentary procedure promotes, are regarded as essential features of the open and democratic society contemplated by the Constitution. It is Parliament's function and responsibility to deal with the broad and controversial questions of legislative policy according to these processes.'[166]

> '...[If] it is not to fail to discharge the functions entrusted to it by the Constitution, there must be some limit on the matters which it can delegate. I do not think it would be helpful to attempt to find a single formulation or criterion for deciding when delegation is permissible and when not, I feel that a complex balancing of various relevant factors has to be done, against a background of what Parliament is there for in the first case. There would seem to be a continuum between forms of delegation that are clearly impermissible at the one extreme, and those that are manifestly permissible at the other.'[167]

Where on this continuum do the CSG age limit and income threshold decisions fall? Similarly where on the continuum would other comparable decisions such as whether or not to legalise abortion or gay marriages, or

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[166] Para 205
[167] Para 206

provide free health care services fall? There is some guidance to be found in Sachs J's words: 'It is Parliament's function and responsibility to deal with the broad and controversial questions of legislative policy according to these processes.'[168]

Based on Sachs J's words, if a decision is a broad and controversial question of legislative policy, then it should be decided by Parliament. All the decisions mentioned above (save for the income threshold) qualify as 'controversial' because they have all invoked intense public debate. All the decisions can also be labeled as 'broad' because they affect the rights and interests of millions of people.

The decisions on the legalising of abortion and gay marriages, and provision of free health care for poor people[169] are examples of 'controversial legislative policy' that have in fact been decided by Parliament and not delegated to the Executive to make in regulations. If these decisions had been delegated to the Executive to make in regulations – would the delegations have been considered constitutional? Are these examples of 'detailed provisions...required for the purpose of implementing and regulating laws,...' or decisions that 'Parliament cannot be expected to deal with.... itself.' ? Or are these decisions about the making of broad and controversial legislative policy that Parliament should be expected to make itself? The comparative examples I have cited are obvious examples of decisions on legislative policy that must be made by Parliament. But what distinguishes them from the decision on whether the State should be obliged to provide a Child Support Grant to all poor children under 18 years? I submit that there is inherently no

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[168] Para 205

[169] The decision on who qualified for free health care was phrased as a delegation to the Executive in the National Health Bill tabled in Parliament [B32-2003]. However, after submissions from civil society (CI, TAC and COSATU), Parliament amended the Bill and made the decisions on who qualifies for free health care itself and delegated a discretion to the Minister to add further categories of persons. See section 3 of the National Health Act the National Health Act 61 of 2003 and P Proudlock and M Shung-King 'CI submission to Parliament on National Health Bill' August 2003.

distinction and that in the case of the CSG a matter of broad and controversial legislative policy has in fact been delegated to the Executive to make in regulations.

Save for the quote from Sachs J above as a separate concurring judgment in, *Executive Council of the Western Cape Legislature,*[170] the question of whether Parliament can delegate matters of 'broad and controversial legislative policy', has not been directly asked of or answered by the Court. The Court has however pronounced on the rules around the delegation of decisions that have the potential to limit human rights. Such decisions tend to also fall into the category of 'broad and controversial legislative policy'. All the decisions used as comparative examples and the CSG decisions can have the effect of limiting rights.

5.3.4 If Parliament intends to limit human rights it must do so expressly and clearly

Section 7(2) read with s8(1) of the Bill of Rights places an obligation on Parliament to respect, protect, promote and fulfil all the rights in the Bill of Rights and expressly bind Parliament to give effect to this obligation when passing laws. This obligation applies to all the rights at issue in the CSG cases. Parliament is permitted to limit any of these rights in a law but only if the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,...' [171]

If Parliament intends to limit any of the rights in the Bill of Rights, it must do so clearly and expressly. This principle has been expressed by the Constitutional

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[170] (1995) ibid fn 126
[171] s36

Court in the cases of *August v Electoral Commission* [172] and *NUMSA and Others v Badar BOP (Pty)(Ltd) and Another.* [173]

Does the Social Assistance Act expressly and clearly provide for a limitation of older children's rights to equality and social security? The applicant in *Mahlangu* has argued that the Act does not clearly authorize a limitation of children's rights and that the regulations promulgated by the Ministers of SD and Finance, that limit children's rights are therefore unlawful. There are two possible interpretations of the Act. The one is that the Act does clearly authorize the Executive to limit children's rights. The other is that it does not.

In *NUMSA*[174], the Court also stated a well used principle of constitutional interpretation – that if the Act of Parliament does not expressly and clearly limit a constitutional right, and the Court can interpret the Act not to limit rights, that interpretation should be preferred over an interpretation that would limit rights.

> '.....If it [the principal Act] is capable of a broader interpretation that does not limit fundamental rights, that interpretation should be preferred.[32] This is not to say that where the legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the democratic will of Parliament. If that were to be done, however, we would have to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by section 36 of the Constitution.'[175]

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[172] 1999 (4) BCLR 363 (CC) at para 33 where Sachs J said: 'Parliament cannot by its silence deprive any prisoner of the right to vote. Nor can its silence be interpreted to empower or require either the Commission or this Court to decide which categories of prisoners, if any, should be deprived of the vote, and which should not. The Commission's duty is to manage the elections, not to determine the electorate; it must decide the how of voting, not the who.'

[173] 2003 (3) SA 513 (CC) at para 37

[174] ibid

[175] para 37

Footnote 32 in the quote refers to case law supporting this principle of interpretation, namely *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*[176] and *De Lange v Smuts NO and Others.*[177]

This interpretive principle derives from s39(2) of the Constitution which requires a Court when interpreting legislation to 'promote the spirit, purport and objects of the Bill of Rights'. In *Investigating Directorate* Langa DP articulated the principle in the following words:

> 'judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.'[178]

It is important to distinguish this interpretive principle from the remedies of reading in and severance that the Court can use after it has found a provision of a law to be constitutionally invalid. In the *Mahlangu* case, the applicant is not alleging that the Social Assistance Act is unconstitutional, but rather that the regulations are unconstitutional because the Ministers have acted ultra vires the Act in limiting the age to 15 years. This approach is based on the argument that the Social Assistance Act can be interpreted to be constitutional – ie as not granting wide unguided powers to the Executive to unjustifiably and unreasonably limit the rights of children to equality and social security below the age of 18 years. To interpret the Act as granting such powers to the Ministers would not promote the spirit, purport and objects of the Bill of Rights. Therefore if a constitutional interpretation 'can reasonably be ascribed to the' Act, and the unconstitutional interpretation avoided, the Court should take the former route. It can be argued that the Social Assistance Act can be interpreted to be constitutional as it stands without the

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[176] 2000 (10) BCLR 1079 (CC) at paras 22-3
[177] 1998 (7) BCLR 779 (CC) at para 85.
[178] At para 23

court having to make a finding of constitutional invalidity and use 'reading in' or 'severance'. If the Court prefers this constitutional interpretation, it would then have find that the regulations that limit the age to 15 years are in fact ultra vires the Act.

The mere fact that the interpretation of the Social Assistance Act is in dispute and is now before the High Court for resolution, indicates that the provisions that delegate the decisions on the age limit and income threshold are not express and clear.

5.3.5 If Parliament delegates discretion to the Executive to make decisions that have the potential to limit human rights, it should provide guidance

In *Dawood and Another v Minister of Home Affairs and Others*[179] the court ruled that if Parliament delegates a discretion to an executive official to make a decision that has the potential to limit human rights, it should provide sufficient guidance in the Act to guard against unjustifiable and unreasonable limitations. If an Act fails to provide such guidance it can be found to be unconstitutional.

> "I have concluded that section 25(9)(b) read with sections 26(3) and (6) is inconsistent with the Constitution because of the absence of legislative guidance identifying the circumstances in which a refusal to grant or extend a temporary permit would be justifiable and that therefore those provisions constitute an infringement of the applicants' constitutional right to dignity, which protects their rights to marry and cohabit. The inconsistency with the Constitution therefore lies in a legislative omission, the failure to provide guidance to the decision-maker".[180]

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[179] 2000 (3) SA 936 (CC)
[180] Para 61

Dawood was concerned with s26(6) of the Immigration Act which provided as follows with regards to temporary residence permits:

> "The Director-General may from time to time extend the period for which, or alter the conditions subject to which, a permit was issued under subsection (3),..."

The court found that the refusal of a temporary residence permit could have the effect of limiting a person's right to family life and therefore their right to dignity. After analysing s26 and the rest of the Act, O'Regan J concluded that 'no guidance is provided as to the circumstances in which it would be appropriate to refuse to issue or extend a temporary residence permit'[181] and that the lack of guidance could result in an unconstitutional limitation of a person's fundamental rights.

> "It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the immigration officials and the DG by sections 26(3) and (6) is constrained by the provisions of the Bill of Rights, and in particular, what factors are relevant to the decision to refuse to grant or extend a temporary permit. If rights are to be infringed without redress, the very purposes of the Constitution are defeated"[182].

The Minister of Home Affairs argued however that a person who has been refused a permit can appeal that decision in a number of forums including the Court. However, O'Regan J found that the existence of a right to review or a right to challenge the decision in court does not relieve Parliament of its

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[181] Para 26
[182] Para 47

obligations to promote, respect, protect and fulfill the rights in the Bill of Rights.

> ".....The fact, however, that the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example, that it was not reasonable, does not relieve the legislature of its constitutional obligation to promote, protect and fulfill the rights entrenched in the Bill of Rights. In a constitutional democracy such as ours the responsibility to protect constitutional rights in practice is imposed both on the legislature and on the executive and its officials. The legislature must take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers."[183]

By analogy, in the case of the CSG delegations it would therefore not be sufficient for Parliament to argue that aggrieved parties can challenge the resulting regulations in Court and that the existence of this remedy is sufficient. The *Mahlangu* case was launched in 2005 and judgment is not yet delivered. The Ncamile case ensured in 2008 that children's rights to the CSG would not longer be eroded by inflation, however for ten years many children's rights had already been eroded and a retrospective order would have been impossible to implement. These timelines demonstrates that it can take a long time for socio-economic class actions to bear fruit and the people whose rights are being violated during that time end up suffering unnecessarily. If Parliament takes 'care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers' then unreasonable limitations of rights can be pro-actively avoided.

Did Parliament take care when drafting the Social Assistance Act to limit the risk of an unconstitutional limitation of children's rights? At the time that the Social Assistance Bill was being drafted in Parliament in 2003, a coalition of civil society organizations made a submission to the Portfolio Committee on Social Development warning Parliament about the broad and vague

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[183] Para 48

delegations in the Act and making constructive suggestions on how to guard against potential unreasonable and unjustifiable limitations of rights.[184] These suggestions included the inclusion of guiding criteria for the limiting of eligibility criteria via regulations and the inclusion of a provision obliging the Minister to consult the public and parliament before finalizing the regulations. However Parliament did not heed this advice.

Another indication that Parliament did not take care when drafting the 2004 Act is the fact that the meaning of the relevant sections of the Act is now a matter of legal dispute with the Court having to decide whether the Act does or does not grant the Minister the authority to limit the age of eligibility for the CSG (*Mahlangu*).

In defining what the Court regards as the Legislature's duty in these circumstances, O'Regan stated that:

> 'It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority.'[185]

In the case of the Immigration Act s56(1) (f) provided that the Minister 'may make regulations relating to . . . the conditions subject to which such permits or certificates may be issued . . . .' However, O'Regan J said that

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[184] See S Rosa, I Frye and P Proudlock 'Joint submission to Parliament on the Social Assistance Amendment Bill (2003)' Page 33

[185] Para 54

> '[a]ffording the executive a power to regulate such matters is not sufficient. The legislature must take steps where the limitation of rights is at risk to ensure that appropriate guidance is given.'[186]

In a number of other paragraphs O 'Regan reiterates that in the South African constitutional scheme it is Parliament that bears the responsibility to determine what circumstances would justify a limitation of rights and to specify these in the principal Act (put in bold by author for emphasis).

> 'Nor can we hold in the present case that it is enough to leave it to an official to determine when it will be justifiable to limit the right in the democratic society contemplated by section 36. Such an interpretation, of which there is no suggestion in the Act, would place an improperly onerous burden on officials, **which in the constitutional scheme should properly be borne by a competent legislative authority**[187]
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> ....
>
> 'It would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining what guidance should be given to the decision-makers, and in particular, the circumstances in which a permit may justifiably be refused, **is primarily a task for the legislature and should be undertaken by it**"[188].

The main distinction between *Dawood* and *Mahlangu* is that in *Dawood* the decision was delegated to an unelected official (the Director General) and related to the daily administrative decisions on residence permits, whereas the decision in *Mahlangu* has been delegated to two elected Executive Ministers and relates to legislative administrative action.

However, the nature of the impact of the rights limitations on spouses seeking temporary residence permits and on children denied social grants is

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[186] Footnote 74 in para 54
[187] Para 50
[188] Para 63. See also paras 57 and 61

comparable, if not worse in the case of children. Furthermore, the numbers of foreign spouses whose rights could be limited is far less than the numbers of children whose rights have been limited.

O'Regan J's specific reference to the Executive being given the power to regulate, to guard against a limitation of rights, as not being sufficient (footnote 74 in para 54 quoted above) also re-iterates that even if the matter is delegated to an elected Executive minister, Parliament should still provide appropriate guidance.

5.4 Conclusion

The delegation of the decisions on the age limit and income threshold for the CSG infringes the principle of separation of powers by vesting too much power in the Executive without sufficient checks and balances to prevent the power being used in a manner that could result in an unconstitutional result. An unconstitutional result could for instance include a failure by the State to give effect to its obligation to promote, protect, respect and fulfill the rights in the Bill of Rights or a limitation of a right in a manner that does not meet the requirements of the limitations clause. The applicants in *Mahlangu* and *Ncamile* have argued that such an unconstitutional result has in fact occurred in that a range of children's rights have been unjustifiably and unreasonably limited by the decisions taken by the Ministers in the regulations to the Social Assistance Act.

Whether the Social Assistance Act actually grants authority to the Executive to limit the rights in the way that they have is currently a matter of legal dispute in *Mahlangu*. The fact that the provisions of the Act can be interpreted in two such diverse ways indicates that Parliament did not take heed of the Court's jurisprudence that if it intends to limit rights it should do so expressly and clearly or the jurisprudence that if it delegates decisions that have the

potential to limit rights, it should provide guidance to guard against unreasonable limitations of rights. These two faults in the Act both point to a finding that the delegations are unconstitutional.

Chapter 6 - The need for public participation in and parliamentary supervision of the regulation-making process

If the Court sends the matter back to Parliament and Parliament chooses to amend the Act to provide guidance for the exercise of the discretion – is this sufficient protection against an unconstitutional limitation of rights by the Executive?

I would argue that it is not because it does not remedy the problem of a lack of protection of the public's right to participate in the making of the regulations or the lack of parliamentary supervision over the delegation.

I have argued above in section 5.3.1 that the right to public participation in the regulation-making process is not well protected by s 4 of PAJA or the case law on s4. I elaborate on this argument below. I also look at the absence in Parliament of a standard mechanism for the scrutiny of regulations as well as the absence of provisions in the Social Assistance Act specifying Parliamentary supervision of the regulations.

I motivate how these additional protections could help to pro-actively guard against unconstitutional limitations of children's rights.

6.1 Public participation in the making of regulations

6.1.1 Critique of PAJA and case law on participation under PAJA

The provisions in PAJA that have been interpreted to apply to subordinate legislation are contained in section 4.[189] Section 4(1) provides for public

[189] See M Beukes 'Administrative action affecting the public: section 4 of the Promotion of Administrative Justice Act 3 of 2000 and the regulations made in terms of section 10 of the Act' (2003) 18 *SA Public Law* 296; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 114; and *New Clicks* para 150

inquiries and notice and comment procedures for administrative action that 'adversely and materially affects the rights of the public'.

While the inclusion of section 4 is an important step in the right direction, there are a number of limitations, which affect its ability to contribute significantly to improved participation, and a culture of justification:

a) The procedures are prescribed only in relation to administrative actions that 'materially and adversely affect the rights of the public' and this wording can be interpreted narrowly by administrators, particularly in relation to regulations that set eligibility criteria for socio-economic rights as these are often seen as extensions of rights.

Some academics have argued in favour of a broad interpretation of this phrase.[190] However, in relation to the CSG regulations it appears as if the State has taken a narrower view. The 2003 regulations that phased in the age extension from 7 to 14 years, were not published for comment, neither were the 2008 regulations that set the age at 15 years and introduced the new income threshold.

As a result, these decisions of great public interest were finalised without adhering to section 4 of PAJA. While it can be agued that the regulations were about progressively extending rights and benefits, it can also be argued that because they also impose conditions and create implementation systems that can result in the rights that are being extended being limited, they also have the ability to materially and adversely affect rights. Furthermore, socio-economic rights are already limited by State non-action therefore each time the State decides to progressively extend the State benefit to some people they also decide to continue to limit other's eligibility for the benefit. For

[190] Currie and Klaaren *The Promotion of Administrative Justice Benchbook* (Siber Ink, 2001) 4.9

instance for children aged 11, the 2003 regulations were progressive. But for children aged 16 years, they effectively continued to limit their rights to social security and equality. Children aged 15 and older, their caregivers, and the organizations that represent their interests should have been given an opportunity to participate in the decision-making process.

The 2003 regulations, which provided for the extension of the age of eligibility for the child support grant from 7 years to 14 years, can appear on the surface to be purely about extending rights. However, the method that the Department chose to implement the extension was criticised at the time by civil society as they foresaw implementation problems that would result in the newly extended grants being terminated after a few months which would violate the caregivers' rights to just administrative action and social security. Civil society alerted the Department to the potential implementation problems, however due to the lack of a formal public participation process imposing an obligation on the Department to consider comments received, they did not consult with interest groups in time to make the changes and they did not consider the interest groups' concerns seriously. If a formal notice and comment procedure had been followed, the Department would have been obliged to seriously consider the comments received and it may have revised its decision in the light of these comments, thereby avoiding the hardship that approximately 450 000 children had to endure over the three years.

b) The definition of 'administrative action' in PAJA excludes 'any decision or failure to take a decision, in terms of section 4(1)' which effectively prevents the decision (or failure to take a decision) with regards to whether or not to have a public participation process, from being reviewed under PAJA.

Legal writing on this exclusion has expressed the opinion that this means that the Administrator's choice[191] of which participation procedure to follow cannot be reviewed. Chaskalson CJ confirmed this in *Minister of Health and another versus New Clicks South Africa (Pty) Ltd and Others.*[192]

> " All that it means is that an Administrator's choice of procedure is final. Consistently with this the implementation of the choice in a manner consistent with sections 4(2), (3) or (4) remains subject to review".[193]

However, it also potentially excludes the courts from reviewing (under PAJA) the administrator's decision that the regulations do not 'materially or adversely affect the rights of the public' or a failure to make any decision at all.[194] In the instances where the Department failed to publish the CSG regulations for comment the problem could also have been a failure to make a decision which is clearly excluded from review.[195]

The un-enforceability of section 4(1) makes it very difficult for civil society to persuade the Executive to publish draft regulations for comment. The Executive is aware their decision or non-decision cannot easily be reviewed under PAJA. Without the encouragement created by an enforcement mechanism, busy administrators are unlikely to volunteer participation opportunities.

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[191] Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 69
[192] 2006(2) SA 311 (CC)
[193] Ibid para 132
[194] It could possibly still be reviewed as a failure to give effect to a statutory duty.
[195] Section 1 : 'administrative action' means any decision taken, or any failure to take a decision, by – any organ of state, when.....which adversely affects the rights of any person and which has a direct, external legal effect, but does not include -.... (ii) any decision taken, or failure to take a decision, in terms of section 4(1); "

c) Section 4 and the Regulations on Fair Administrative Procedures[196] do not prescribe that administrators are obliged to compile a report in which they show their consideration of the comments and provide reasons for their final choice.

Without this requirement, notice and comment can become an expensive window dressing exercise and the public may soon lose faith in participating in such procedures and rather choose to invest their time and money in going to court where their concems will get a fair hearing and they will be given reasons for the decision.

Considerable time and money was spent by civil society organisations in writing submissions, lobbying Parliament and flying up to Pretoria to have meetings with the Department of Social Development. If this open communication from civil society is not met by an open reception and a culture of justification on the side of the Executive, civil society will grow weary and despondent.

d) The Minister is required in terms of s10 (1) of PAJA to make a code of good administrative practice for administrators and s10(2)(b) provides that the Minister may make regulations with regards to rule-making protocols. The code was drafted and published for comment in 2006 and has been forwarded to Parliament for consideration. The Department of Justice is awaiting Parliament's response.[197] The regulations in terms of s10(2)(b) have not yet been drafted.[198] The Minister may also establish an advisory council to advise him/her on the appropriateness of uniform rules and standards for administrative

[196] Promotion of Administrative Justice Act 3 of 2000: GNR1022 in GG 23674 of 31 July 2002
[197] Personal communication with Ina Botha, Director in the Legislation Directive of the Department of Justice 10 February 2009
[198] Ibid

action, registers of regulations, and lapsing of regulations. However, the advisory council has not yet been established.

The absence of these mechanisms constrains the ability of the principles of participation being integrated into the daily practice of officials who are responsible for making regulations.

The case law on the public's right to participate in the making of regulations is also not encouraging. I elaborated on this problem in section 5.3.1 above. In summary, in *Minister of Home Affairs v Eisenberg and Associates: In re Eisenberg and Associates v Minister of Home Affairs*[199] Chaskalson J allowed the Minister of Home Affairs to avoid a public participation process. I argue that Chaskalson J seemed to have neglected to take cognizance of the fact that the Department had actually had a year between the passage of the Act by Parliament and the date of commencement, in which to fulfill the requirements of at least a notice and comment procedure. If a Department's own bad time management is allowed to suffice as a justifiable reason for departing from the public participation requirements of section 4 then section 4 is likely to be ignored by administrators.

6.1.2 Recommendations for reform

For the reasons stated above and in section 5.3.1, I argue that the provisions of PAJA are weak and vague and can easily be (and have been in the case of the CSG) interpreted by the Executive as voluntary provisions. When faced with a decision that has large financial resources and a constituency that does not vote (ie children), the Executive is likely to take the easy road and not publish for comment. If it does publish for comment, the stakeholders have no right to reasons or a report as to why the final decision was taken

[199] 2003 (5) SA 281 (CC)

and the comments not incorporated, thereby allowing the Executive to make decisions that affect the public without having to justify their decisions.

I conclude that PAJA therefore does not give effect to the constitutional principle of participatory democracy. PAJA could be challenged in this respect for not giving full effect to section 33(3) in respect to procedural fairness in relation to the regulation-making process. However, it is more likely that the Court will in time interpret PAJA in a way that reads in a mandatory obligation on administrators to follow public participation procedures in cases of regulations that have the potential to limit human rights, such as the CSG regulations.

However, until such an interpretation emerges, decisions are being taken every day by the Executive in regulations without the right to participation being afforded the protection it deserves under the South African constitutional scheme. I argue therefore that PAJA should be amended so at to clearly place a reviewable statutory obligation on the Executive to provide adequate public participation opportunities in regulation-making processes. This should specifically include decisions that appear to be about the progressive extension of socio-economic rights but that also have the potential to perpetuate limitations of people's socio-economic rights if not progressive enough. These are important decisions that affect the rights of millions of people and billions of rands and they should be made as consultatively as possible.

In the absence of an amendment to PAJA, the Social Assistance Act could be amended so to expressly oblige the Executive to give the public an opportunity to participate in the making of regulations that affect people's access to social grants.

6.2 Parliamentary supervision

6.2.1 Parliament has recognised the need for a scrutiny mechanism

The authority to supervise the regulation-making process is inherent in Parliament's law-making powers. Because Parliament has delegated the authority to the Executive, it is perfectly within its rights to supervise the delegate. Supervision would also ensure that Parliament was fulfilling its obligation to exercise oversight over executive action, in particular over the implementation of legislation.[200]

Section 101(4) grants Parliament the power to pass legislation specifying the manner in which regulations should be tabled and approved by Parliament. Parliament has not yet enacted a law or rules for Parliamentary involvement in the regulation-making process.[201] Parliament has however recognised the need for a regulations scrutiny mechanism and in 1998 established the Joint Sub-Committee on Delegated Legislation to investigate what the scrutiny role of Parliament should be and to make recommendations to both houses. The sub-committee commissioned comparative research on the subject and the research report provides valuable comparative information on parliamentary scrutiny mechanisms and recommends that South Africa adopt a standard system of scrutiny of delegated legislation.[202]

Since the report, a number of meetings have been convened[203] to discuss the subject but a final decision on a scrutiny mechanism as not yet been made.

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[200] ss 42(3) and 55(2) (b)

[201] The Interpretation Act 33 of 1957 provides in section 17 that lists of regulations must be submitted to Parliament within 14 days of having been gazetted. The regulations are then announced as 'tabled' by the respective Ministers in the Parliamentary Papers (Announcements, Tablings and Committee Reports). This mechanism merely notifies Parliament of the existence of the regulations and does not initiative a scrutiny process.

[202] H Corder et al 'Corder Report' – Final Report on Methods for Scrutiny of Legislation by Parliament 2 March 1999

[203] See pmg.org.za for copies of all the minutes of the sub-committee and joint rules committee spanning the period 1998 to 2008

Due to the length of time the process was taking, the sub-committee recommended that an interim mechanism should be established to at least ensure that where principal Acts expressly provide for Parliamentary supervision, the specified procedures are in fact followed. A resolution setting out the nature and scope of the interim scrutiny mechanism was approved by the Joint Rules Committee on 20 June 2007[204] and was twice put on the National Assembly's Order Paper for adoption but was twice deferred.[205] The draft resolution limits the ambit of the interim mechanism to:

> 'delegated instruments requiring approval by Parliament and delegating provisions in enabling legislation referred to in accordance with the scrutiny criteria identified in these Interim Rules'.

Parliament has over the years put provisions into a handful of principal Acts specifying that parliament must approve the regulations drafted under these Acts. These include the Water Services Act 108 of 1997[206], National Water Act 36 of 1998[207], Non-profit Organisations Act 71 of 1997[208], National Environmental Management Act 107 of 1998, Domestic Violence Act 116 of 1998, Promotion of Access to Information Act 2 of 2000[209], Promotion of Administrative Justice Act 3 of 2000[210], the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000[211], the Immigration Act 13 of 2002, [212] and the Children's Act 38 of 2005.[213] It is the regulations of these Acts that would need to be considered by the interim scrutiny mechanism.

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[204] Draft Resolution for establishment of interim scrutiny mechanism. Joint Rules Committee meeting 20 June 2007. Parliamentary Monitoring Group minutes. www.pmg.org.za
[205] Personal communication with Marina Griebenouw Senior Parliamentary State Law Advisor 16 February 2009
[206] s71 and 75
[207] s69-71
[208] s 27 and 28
[209] s 92(2) requires that regulations be submitted to Parliament (but not approved by Parliament) before publication in the Gazette.
[210] S 10
[211] S 30
[212] s 7
[213] s 3

The draft resolution lists the scrutiny criteria which includes 'whether they [the regulations] trespass on personal rights and liberties, including those set out in the Bill of Rights' and 'whether they amount to substantive legislation, as delegated legislation should not purport to replace the parent Act'.

However, even if this interim mechanism was in effect, it would not automatically help in the case of the CSG because the Social Assistance Act does not prescribe Parliamentary approval or involvement.

6.2.2 Recommendations for reform

The Social Assistance Act does not provide for parliamentary involvement in the regulation-making process and the history of the regulation decisions outlined in chapter 4 shows that Parliament also did not exercise its inherent authority to supervise the Executive. This left it up to civil society to protect and represent the interests of millions of poor children, resulting in civil society eventually having to resort to the Court to ensure that children's rights were protected. While civil society plays the role of rights champion, the Bill of Rights expressly binds Parliament to respect, protect, promote and fulfil the rights in the Bill of Rights. A scrutiny mechanism that screens draft regulations for unconstitutional limitations of rights would help ensure that Parliament gives effect to this obligation and thereby pro-actively prevent violations of children's rights.

I therefore argue for a standard scrutiny mechanism to be adopted by Parliament or for the Social Assistance Act to be amended so as to expressly require Parliamentary scrutiny and approval of the regulations prior to their promulgation.

7. Conclusion

The argument in this dissertation is summarised in detail in Chapter 1 (Introduction). I conclude with the following shorter summary:

(1) Decisions on 'broad and controversial legislative policy' and decisions that have the potential to limit human rights, such as the decisions on eligibility for the CSG, should preferably be decided by Parliament and not delegated to the Executive.

(2) Such decisions may be delegated to the Executive if the principal Act provides clear guidance for the exercising of the discretion to guard against unconstitutional limitations of rights.

(3) However, the provision of guidance in the principal Act is not sufficient to protect against unconstitutional limitations to children's rights. I therefore argue for additional conditions, namely that -

> (a) the principal Act should expressly provide for parliamentary supervision over the delegation and for public participation in the making of the decisions, or
>
> (b) PAJA needs to be amended or interpreted by the Courts to ensure that the obligation to facilitate public involvement in the making of regulations is clearly articulated as a mandatory element of the regulation-making process including for regulations that progressively extend access to socio-economic benefits and services, and Parliament needs to introduce a permanent scrutiny mechanism to scrutinize regulations for potential unconstitutional human rights limitations.

While (a) would address the problems in the CSG regulations, (b) would ensure a systemic remedy for all regulations.

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