

Children's Socio-economic rights and funding of social services

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Fiscal Commission



Overview of this Presentation

- To consider the funding of child welfare service from the perspective of children's socio-economic rights as framed in international, regional and constitutional law
- To consider Children's Act obligations within that framework



UNCRC

SA ratified the UNCRC in 1995

Article 4 proclaims the following:

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



Interpretation of Art 4

- Hammerberg (2001) observed that the ‘maximum extent of available resources’ did not imply that poorer countries could avoid responsibilities – it is rather a call for prioritisation of children within the state budget. Hammerberg also made a comparison between Art 4 of the UNCRC and Art 2(1) of the UN Convention on Economic, Social and Cultural Rights, saying UNCESCR allows for progressive realisation, but UNCRC does not (except in specific articles)

General Comment pours cold water on that interpretation

- 2003 General Comment of the UN Committee on the Rights of the Child

-On implementation:

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

Other SER in UNCRC

UNCRC also contains other important provisions regarding SER:

Child's right to 'maximum survival and development' (art 6)

Appropriate assistance to parents in the performance of their child-rearing duties (art 18)

Highest attainable standard of health and facilities for treatment and rehabilitation of health (art 24)

Social security – no specific mention of funding by the state (art 26)

A good enough standard of living (art 27)

Education (including free basic) (art 28)



ACRWC and SER

- Does not separate out SER from other rights, so does not contain a clause like Art 4 of the UNCRC, and no qualification regarding availability of resources for SER
- Right to education more fully framed in ACRWC, express measures to promote girl children and protection for girls who fall pregnant at school – no similar provisions in UNCRC
- Health care services more detailed in ACRWC
- But, ACRWC does not set out a right to social security

Common approach

- They focus on services and material benefits to children
- Both acknowledge primary responsibility of parents to care for SER of children, but both instruments clear that in case of need, the state must provide material assistance to children either through assisting parents or directly.

SA Constitution

- Section 28(1)(c) states that every child has the right
 - “to basic nutrition, shelter, basic health care services and **social services**”
- This clause does not have any ‘internal qualifiers’, unlike other SER clauses in the Constitution.



SA Constitution

- Section 26 (right to housing) and s 27 (right to health care, food, water and **social security- and social assistance**) apply to everyone, including children. However these have various internal qualifiers:
- Govt must take ‘reasonable legislative and other measures’
- ‘within available resources’
- to achieve ‘progressive realisation’ of the right



Key questions

- Does Section 28(1)(c) impose a direct duty on the state to provide basic necessities to children lacking them without delay?
- Does ‘progressive realisation’ have any application when children are claiming their socio-economic rights?
- To what extent do children have a direct claim against the state when they are still living with their parents?



Progressive realisation – what was intended?

- Panel of Constitutional Experts:
 - International instruments do not limit rights of children by requiring reasonable and progressive steps.
 - This is because (a) vulnerability and lack of maturity of children and (b) children cannot be expected to participate in HR discourse.

So state must make a greater effort for children. “The sub-clause will not permit children to make unreasonable demands on the state”.

To summarise the Courts' approach to SER

The constitutional court in South Africa views all rights as justiciable, including socio-economic rights, and the court is prepared to examine the state's role in respecting, protecting, promoting and fulfilling its obligations. The courts will not go so far as to prescribe to the state what policy choices it must make to achieve the rights, but will intervene if the policy choices fail the constitutional standard of rationality and reasonableness. The separation of powers balance is crucial to the assessment of the delivery of socio-economic rights.



To summarise the Courts' approach to **Children's SER**

- The Courts have indicated that where children are living with their parents they should first look to parents (before looking to the state) to achieve SER such as housing. (Grootboom case)
- But if the SER cannot be provided by parents (eg medication to prevent MTCT of HIV AIDS) then the state must provide (TAC case)
- If children are living away from their parents or parental care is lacking, the State has a direct obligation to provide for their rights (Centre for Child Law v Min Home Affairs, Centre for Child Law v MEC for Education)
- Constitutional Court has interpreted the right to education as being directly and immediately enforceable, because unlike s 26 and 27 it contains no internal qualifiers
- This is the same as s 28(1)(c) which includes **social services**



Children's Act 38 of 2005

- Section 4(2) of the Children's Act reads as follows:
- “Recognising that competing social and economic needs exist, organs of state in the national, provincial and where applicable, local spheres of government must, in the implementation of this Act, **take reasonable measures to the maximum extent of their available resources to achieve the realization** of the objects of this Act.”



Children's Act 38 of 2005

- Section 105: Provision of designated child protection services
- The MEC for social development **must**, from money appropriated by the relevant provincial legislature, provide and **fund** designated child protection services
- Section 146: Prevention and Early Intervention
- Section 193: Provision of Child and Youth Care Centres



Conclusion

- Children's rights to social services are immediately realisable and not subject to progressive realisation (arguments that there is a lack of budget will therefore not be persuasive to a court)
- When it comes to the services that the MECs **must** fund, it is therefore not defensible for government to only partially fund these services

