

An Analysis of South Africa's Constitutional and UNCRC-imposed Obligations to achieve Children's Socio-economic Rights: A Critique

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Children require specific protection due to their heightened vulnerability to human rights violations, which can be attributed to several factors such as economic adversity, racial tensions, and armed conflicts. The current situation in South Africa is characterised by a pressing and significant prevalence of severe poverty. The enduring effects of apartheid have contributed to a broad range of socioeconomic challenges inside our deeply divided country. Children are particularly impacted by these issues and experience immediate suffering as a result. In the Republic of South Africa, a significant proportion of the youth population experiences the distressing circumstance of living in poverty. It has been reported that a significant proportion, ranging from 60 to 75 percent, of the youth population in South Africa is experiencing impoverished living conditions. The prevalence of HIV infection and the consequential mortality rates due to AIDS among caretakers have a detrimental effect on the well-being of children. The United Nations Convention on the Rights of the Child (UNCRC) encompasses social, economic, and cultural rights under its provisions. Following the ratification of the UNCRC in June 1995, South Africa is legally obligated to implement the articles pertaining to the rights of children. The formulation and structuring of socio-economic rights and corresponding duties towards children under the South African Constitution were significantly influenced by the UNCRC. The interests of children in South Africa are effectively safeguarded through the provisions enshrined in the Constitution and the duties outlined in the UNCRC. This study assesses the extent to which South Africa has adhered to its constitutional and UNCRC-mandated responsibilities and commitments in order to achieve the socioeconomic rights of children.

Keywords: *UNCRC, socio-economic rights, children, obligations, Constitution*

Introduction

The Constitution of the Republic of South Africa, enacted in 1996, serves as the fundamental framework for the nation's newly founded democratic society, embodying concepts of democracy and social equity. The objective was to reconcile the division resulting from historical events. The specific inclusion of provisions in the South African Constitution that mandate the safeguarding and upholding of constitutional rights by the court is a fortuitous circumstance. The

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South African Constitution is among the constitutions that provide protection for socio-economic rights¹.

Indeed, the South African Constitution is notable for its inclusion of socioeconomic rights pertaining to children within its final draught. This demonstrates that children are granted certain safeguards under the most prominent legislation in South Africa. As a consequence, it has attained a level of equivalence with global human rights accords such as the United Nations Convention on the Rights of the Child (UNCRC). Legal scholarship, both inside South Africa and internationally, widely recognises that children constitute a vulnerable population within society and hence warrant the utmost care.² The primary aim of this study is to analyse the socio-economic rights of children, as articulated in the South African Constitution, in relation to the UNCRC.

The Constitutional Court ruled in the case of *S v. Makwanyane & another*³ that both binding and non-binding international law may be considered in interpreting the Bill of Rights. According to Chaskalson CJ, Chapter 3 of the interim constitution, which encompasses the Bill of Rights, can be comprehensively examined and interpreted within the framework of international human rights law. In addition, it is worth noting that practical measures implemented by pertinent international human rights organisations can provide valuable insights into the appropriate interpretation of specific provisions.

In the case of *Government of the Republic of South Africa & others v Grootboom & others*⁴, Jacob J. asserted that international law can serve as a valuable tool for interpretation. However, he emphasised that the significance attributed to individual international concepts or norms should be subject to variation. Nevertheless, this approach could be promptly implemented in situations when South Africa is bound by the pertinent international legal norm.

While the UNCRC does provide some rights to state parties, it is crucial to acknowledge that these rights are accompanied by corresponding obligations and responsibilities. This study aims to examine the extent to which South Africa is meeting its commitments as outlined in the UNCRC, and to explore the mechanisms by which this is being achieved, if applicable. Insufficient attention has been devoted to the socio-economic rights of impoverished children in South Africa and the potential impact of the UNCRC on these rights, as well as its role in assisting South Africa in meeting its commitments under the UNCRC. The objective of this study is to address this disparity.

Literature Review

It is imperative to acknowledge that within the context of South Africa, there exists a multitude of literary works pertaining to socio-economic rights. However, it is noteworthy that a significant proportion of these works just offer a broad and

¹Dube (2020).

²Wright & Potter (2012).

³1995 (3) SA 391 (CC).

⁴2001 (1) SA 46 (CC).

general perspective on the subject matter. Firstly, their discussion lacks emphasis on the socio-economic rights of children. Furthermore, there is a notable lack of consideration of the potential impact of international human rights law, including the UNCRC, on the socio-economic rights of children in South Africa.

Erika de Wet identified and discussed the socioeconomic rights of children.⁵ The author analysed international organizations like WHO, FAO, and UNICEF to understand their impact on children's socio-economic rights. However, their analysis was limited in examining the UNCRC's impact on South Africa's constitutional rights. The analysis focused on the horizontal and vertical application of these rights, lacking a comprehensive examination of the UNCRC's impact on South Africa's constitutional rights.

Much of the above criticism applies with equal force to a similar study by Karrisha Pillay⁶. The author classified socio-economic rights into several categories such as social welfare, food, and healthcare, providing a comprehensive analysis of their respective entitlements, implementation strategies, and protective measures. The authors of the study also conducted an analysis of the United Nations Convention on the Rights of the Child (UNCRC) and other international organisations pertaining to child rights. However, they encountered difficulties in elucidating the possible influence of these entities on the socio-economic rights of children in South Africa.

Devenish explored children socio-economic rights in South African Constitution⁷. The author proceeded to illustrate the heightened vulnerability of children to infringements upon their human rights, thereby necessitating the provision of distinct attention and safeguarding measures. The author continued to provide evidence of South Africa's ratification of the UNCRC in a manner that deviated from the norm. However, the author failed to address the potential consequences and ramifications associated with South Africa's membership in this international treaty.

In a resource book on socio-economic rights in South Africa, Khoza came very close to addressing this issue⁸. While the impact of the UNCRC was duly acknowledged and the discourse encompassed socio-economic rights in South Africa, it is noteworthy that children did not constitute the primary focal point of the discussion.

Alston expounds on the socio-economic rights of children, but two flaws in the study's design seem to limit its applicability⁹. First of all, this study was limited to the concept of the "best interest of the child." Second, South Asian nations, Zimbabwe, Burkina Faso, and France were the main subjects of the study. Alston was in no way interested in South Africa.

Rautenbasch¹⁰ gave a lot of consideration to a Bill of Rights clause that was included in the interim constitution at the expense of children's socioeconomic

⁵De Wet (1998).

⁶Liebenberg & Pillay (2000).

⁷Devenish (1998).

⁸Khoza (2007).

⁹Alston (1994).

¹⁰Rautenbach (1995).

rights that were included in the final constitution. Another work which dealt with children socio-economic rights, including the UNCRC is of Alston, Parker and Seymour¹¹. Like Alston, Parker despite the fact that this work was completed before the South African constitution was established, South Africa was overlooked.

Methodology

This study employs desktop research, a qualitative research approach, to assess the UNCRC, the obligations imposed on convention members, and South Africa's adherence to these obligations through legislative measures and legal precedents. This is achieved, among other methods, by the examination of legal texts, legal periodicals, scholarly literature, online resources, significant statutes, appellate court decisions, and Constitutional Court rulings. The International Covenant on Civil and Political Rights will also serve as a source for this study. The Constitution of the Republic of South Africa, 1996, which serves as the supreme law of the land, will also be a significant primary source for this study.

Universal and Forward-looking Principles of the UNCRC

The UNCRC holds equal importance for individuals across the globe. The agreement delineates universally applicable criteria while simultaneously considering the distinct cultural, social, economic, and political contexts of individual States, thereby granting each State the autonomy to determine its own mechanisms for upholding these rights collectively. The convention outlines four fundamental principles. These provisions are intended to facilitate the understanding and analysis of the agreement in its whole, thereby guiding the development and execution of national implementation initiatives. The four principles can be identified as follows¹²:

*Non-discrimination*¹³

According to the precise language of the text, it is envisaged that states parties will ensure that all children under their jurisdiction have access to this protection and that no child is exposed to any form of discrimination. This principle is applicable to all children, regardless of their race, colour, sex, language, religion, political opinion, national origin, ethnic origin, socioeconomic status, property, disability, birth, or any other status pertaining to the child or the child's parents or legal guardians.

Equal opportunity is widely seen as a key component. It is imperative that both girls and boys are afforded equitable access to opportunities. Irrespective of their ethnic background, country, or association with a minority group, it is

¹¹Alston, Parker & Seymour (1992).

¹²Articles 2, 3, 6 & 12 of UNCRC. See also De Wet (1998).

¹³Article 2 of UNCRC.

imperative that all children are afforded equal rights comparable to their peers. It is imperative that all children, irrespective of their disability, are afforded the opportunity to lead a life of comfort and well-being.

*Best Interest of the Child*¹⁴

When a State's administration makes decisions that have an impact on children, it is imperative that the best interests of the children are prioritised. This guideline must be adhered to by courts of law, legislative bodies, administrative agencies, and both public and private social welfare institutions when making decisions. Implementing this concept in real-world scenarios poses significant challenges, albeit being the central theme of the Convention.

*The Right to Life, Survival and Development*¹⁵

The article on the right to life also encompasses the rights to development and survival, which are to be ensured to the utmost extent feasible. In the present environment, it is imperative to adopt a comprehensive definition of "development" that encompasses several dimensions and incorporates a qualitative aspect. This is because development extends beyond physical well-being and encompasses mental, emotional, cognitive, social, and cultural aspects.

*The Views of the Child*¹⁶

Children should be afforded the opportunity to use their freedom of expression in all topics that pertain to them. The perspectives of individuals should be assigned the appropriate significance that aligns with their worth, taking into consideration the child's age and level of development. The fundamental tenet posits that children possess an inherent entitlement to be afforded a platform for expression and to have their perspectives accorded due regard, particularly within the context of legal or bureaucratic proceedings that may exert an influence upon them.

Obligations of States Parties to the UNCRC

The fulfilment of socio-economic rights of children constitutes a significant set of requirements that must be met by signatories to the UNCRC. These obligations can be outlined as follows:

1. States Parties are obligated to uphold and safeguard the rights of every child, irrespective of their race, colour, gender, language, religion, political beliefs, national or ethnic background, socioeconomic status, property

¹⁴Article 3 of UNCRC.

¹⁵Article 6 of UNCRC.

¹⁶Article 12 of UNCRC.

ownership, handicap, birth status, or any other characteristic of the child or their parents or legal guardians.¹⁷

2. States parties have a binding duty to ensure the well-being and optimal growth of the child. States parties have an obligation to use maximum effort in ensuring that the right of every child to obtain medical treatment is not infringed upon. The parties involved recognise the entitlement of children to the highest achievable standard of health.¹⁸
3. The agreement stipulates that States which have ratified it are obligated to decrease rates of newborn and child mortality, as well as ensure universal access to healthcare for all children. States Parties have a binding obligation to implement all feasible measures to prohibit age-inappropriate customs. According to states parties, it is asserted that every child is entitled to a level of life that is suitable for their physical, mental, spiritual, moral, and social growth. States parties are obligated to implement suitable measures to support parents and individuals with parental responsibilities in the exercise of their rights. When deemed required, states parties should provide tangible assistance and support, specifically addressing food, clothing, and housing requirements.¹⁹
4. The parties recognise and accept the fundamental right of children to receive an education.²⁰ The States Parties acknowledge the entitlement of children to protection against economic exploitation, including their engagement in labour that poses potential hazards or disrupts their educational pursuits. Furthermore, children should be safeguarded from work that may jeopardise their health or impede their physical, mental, spiritual, moral, or social growth. Furthermore, it is agreed by States Parties that it is imperative to protect the child from any form of sexual exploitation and abuse.²¹

Steps and Measures taken by South Africa to meet the UNCRC Obligations

Incorporating Children's Rights in the Constitution²²

Section 28 of the Constitution of the Republic of South Africa, 1996, entitled "children's rights", provides that:

1. Every child has the right to-
 - a) A name and nationality from birth;
 - b) Family care or parental care, or to appropriate alternative care when removed from the family environment;

¹⁷Article 2 of UNCRC.

¹⁸Article 6 of UNCRC.

¹⁹Articles 24 & 27 of UNCRC.

²⁰Article 28 of UNCRC.

²¹Article 32 & 34 of UNCRC.

²²The Constitution of the Republic of South Africa, 1996.

- c) Basic nutrition, shelter, basic health care services and social services;
 - d) Be protected from maltreatment, neglect, abuse or degradation;
 - e) Be protected from exploitative labour practices;
 - f) Not be required or permitted to perform work or provide services that-
 - i. Are inappropriate for a person of that child's age; or
 - ii. Place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - g) Not be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
 - i. Kept separately from detained persons over the age of 18 years; and
 - ii. Is treated in a manner, and kept in conditions, that take account of child's age;
 - h) Have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;
 - i) Not be used directly in armed conflict, and to be protected in times of armed conflict.
2. A child's best interests are of paramount importance in every matter concerning the child.
 3. In this section 'child' means a person under the age of 18 years.

Based on the stipulation provided, it can be inferred that minors possess entitlements to a designation, legal membership within a nation-state, and a prescribed level of nurturing. It is imperative that children are provided with essential provisions such as food and shelter, alongside ensuring their protection from abusive, neglectful, and degrading treatment. If an individual of a young age does not meet the minimum age requirement for employment, it is advisable that they refrain from engaging in any tasks or responsibilities that may impede their educational progress or hinder their personal growth and maturation. The subsequent part elucidates the imperative nature of prioritising the best interests of the child in every decision pertaining to them.

In the case of *Government of RSA & others v. Grootboom & others*²³, the court conducted an examination to determine the extent to which citizens have the ability to legally force government action in order to safeguard their social and economic rights. The constitutional requirements outlined in sections 26 and 28(1)(c) of the Constitution of the Republic of South Africa, 1996, pertaining to the guarantee of adequate housing for all individuals and the provision of shelter for children, had come under scrutiny. The initial petitioner, Irene Grootboom, was among a group of 510 children and 390 adults who were compelled to reside in highly unsatisfactory conditions within the Wallacedene informal settlement. The High Court determined that the children, along with their parents acting as

²³2001 (1) SA 46 (CC).

their representatives, possessed a legally recognised entitlement to seek shelter as stipulated by section 28(1)(c).

In a majority ruling, Justice Yacoob of the Constitutional Court underscored the constitutional obligation of the State to adopt proactive steps in order to assist persons residing in deplorable conditions. The need was to ensure the provision of housing, healthcare, sufficient sustenance and hydration, social security, and other essential requisites for individuals who lacked the means to independently sustain themselves and their dependents. Given the recognition by the Constitution of the inherent challenges involved, it did not impose an expectation on the State to fully utilise all available resources or expeditiously actualize these rights. Nonetheless, it was incumbent upon the State to gradually implement these rights and provide the requisite legal and social structures. The aforementioned programme in the region failed to fulfil this obligation. The court issued directives to the State to provide assistance to individuals who are in need and have not yet received any form of aid.

In another interesting case of *Mahlaule & others v. Minister of Social Development*²⁴, in this case, constitutional arguments were raised against sections 4(b)(ii) and 4B(b)(ii) of the Social Assistance Act 59 of 1992. The provision of grants for care-dependency and child support was limited to those who had South African citizenship, as specified under the relevant categories outlined in this section. Due to their violations of the rights to social security and social assistance in section 27 and the rights of children in section 28 of the Constitution, the Constitutional Court ruled that those sections were unconstitutional.

Almost similar position was held in the case of *Minister for Welfare and Population Development v. Fitzpatrick & others*²⁵, The Cape High Court found section 18(4)(f) of the Child Care Act 74 of 1983, which imposed a prohibition on foreigners adopting South African children, as unlawful. During the confirmation process for the Constitutional Court, Justice Goldstone determined that the prohibition was in contradiction with section 28(2) of the constitution. This clause stipulates that the best interests of children must be prioritised in all situations involving them. The court acknowledged that under specific circumstances, it may be in the best interests of a South African child to be adopted by a family that is not of South African origin. The confirmation of the order was determined to be invalid.

Legislative Reform

The UNCRC has exerted a substantial impact on the legal transformation within South Africa subsequent to its ratification in 1995. While the explicit reference to the UNCRC is limited to two statutes, the analysis of the legislation reveals that the priorities outlined in the UNCRC have been duly considered. Legislation that provides specific protections for children includes:

²⁴2004 (6) SA 505 (CC).

²⁵2000 (3) SA 422 (CC).

- i. The Child Care Act 74 of 1983, a legislation that criminalises the act of neglecting to provide a child under one's care with essential provisions such as sustenance, housing, apparel, and medical care.
- ii. The Basic Conditions of Employment Act 75 of 1997, which makes it illegal to employ a child under the age of 18 years.
- iii. The Domestic Violence Act 116 of 1998, which outlines various types of domestic abuse and details how a child can obtain a protection order against the abuser.
- iv. The Films and Publications Act 65 of 1996, which protects children from exploitation in child pornography.
- v. The Natural Fathers of Children Born out of Wedlock Act 86 of 1997. This legislation provides legal entitlements to unmarried fathers, allowing them to petition the court for visitation rights, custody, or guardianship of their children. This includes cases where the father's marriage is not officially recognised by the State, such as in Muslim and Hindu marriages. In the determination of child custody or visitation rights, paramount consideration is given to the best interests of the children involved.

Other relevant statutes are:

1. The Adoption Matters Amendment Act 56 of 1998;
2. The Recognition of Customary Marriages Act 120 of 1998; and
3. The South African Schools Act 84 of 1996.

The Children's Act 38 of 2005, which superseded the Child Care Act 74 of 1983, makes reference to the UNCRC as a source of advice. The endeavour is aimed at facilitating a comprehensive comprehension of the entirety of children's rights.

In the case of *Fraser v. Children's court, Pretoria North & others*²⁶, Laurie Fraser, who was not married, fathered a child that his ex-partner gave up for adoption. The children's court granted the child's request for adoption, but Fraser asked that it be reversed so that he may adopt the youngster himself. A father's consent was not required for the adoption of his children who were born out of wedlock under section 18(4)(d) of the Child Care Act 74 of 1983, but a children's court had to get both parents' consent before issuing an order for the adoption of a legitimate child. The court ruled that this violated the equality right. It was discriminatory towards fathers in weddings conducted in accordance with the traditions of religions like Islam and Hinduism, which were not recognised by the law as marriages. The court, however, decided that further consideration was needed before the clause could be changed, and it gave parliament two years to correct the issue.

²⁶1997 (2) SA 261 (CC). See also Articles 32 & 34 of UNCRC

Interpreting Domestic Legislation

In the process of interpreting domestic or national legislation, it is imperative to give due consideration to Section 233 of the Constitution of the Republic of South Africa, 1996. According to Section 233, it is mandated that courts should prioritise reasonable interpretations of laws that align with international law, over interpretations that are inconsistent with international law. International law plays a prominent role in the process of statutory interpretation by providing a distinct and unambiguous framework for interpretation. The aforementioned statement aligns with the final two sentences of General Comment 9 to the International Treaty on Economic, Social and Cultural Rights (ICESCR), which assert that "this interpretive presumption is mandated by international human rights law and by the legal provisions of the covenant."²⁷

Six minors in *S v. Williams & others*²⁸, were subjected to the penalty of "moderate correction" as stipulated in section 294 of the Criminal Procedure Act 51 of 1977, which entailed the administration of a series of light cane blows. The Constitutional Court possessed the jurisdiction to determine the legality of the juvenile whipping penalty. The Court has determined that physical punishment violates the right to be treated or punished in a manner that is free from cruel, inhumane, or degrading treatment, and also undermines an individual's feeling of dignity. It was determined that administering corporal punishment to young individuals was deemed to be a violation of the dignity of both the recipients and those responsible for carrying out the punishment.

Interpreting the Bill of Rights

According to Section 39 of the Constitution of the Republic of South Africa, 1996, any court, tribunal, or forum tasked with interpreting the Bill of Rights is obligated to advance the principles that form the foundation of an open and democratic society, which include human dignity, equality, and freedom. Furthermore, these entities are required to take into account international law and have the discretion to consider foreign law as well.

In the case of *S v. Makwanyane*²⁹, the Constitutional Court held that, when interpreting the Bill of Rights, it is permissible to use both binding and non-binding international law. Chaskalson CJ, in his capacity at the time, further stated that the field of international human rights law provides a structure through which chapter 3 (Bill of Rights of the interim constitution) can be evaluated and comprehended. Moreover, he noted that the actions taken by relevant international human rights organisations can serve as a source of direction in interpreting specific provisions. Nevertheless, it has been found that among all treaties, the ICCPR has been extensively relied upon as the primary basis for South African court rulings and has been frequently referenced during the process of legal interpretation, specifically in relation to the Bill of Rights. This conclusion was

²⁷Heyns & Viljoen (2001).

²⁸1995 (3) SA 632 (CC).

²⁹1995 (3) SA 391 (CC).

drawn from a comprehensive analysis of the decisions made by the High Courts and the Constitutional Court since 1995.³⁰

In the case of *Government of Republic of South Africa v Grootboom and others*³¹, the court placed significant emphasis on the role of international law, which was given greater weight compared to the case of *S v. Makwanyane*. In the aforementioned case, Jacobson J expressed that while international law can serve as a guiding tool for interpretation, the significance attributed to specific principles or rules of international law may differ. However, in cases where South Africa is bound by the relevant principle of international law, it may be directly applicable.

In the case of *Minister of Health & others v. Treatment Action Campaign & others*³², the government's stance on the prevention of mother-to-child HIV transmission, specifically the restricted implementation of Nevirapine to certain trial sites, was challenged by the Treatment Action Campaign and two other parties. The manufacturers of nevirapine agreed to supply the medication to the South African government without charge for a duration of two years. The court's decision established that the pursuit of research does not provide sufficient grounds for justifying the postponement of a comprehensive scheme. Due to the inability to reach the designated research locations, a significant proportion of women and children who tested positive for HIV experienced detrimental consequences as a result of the policy, as they were effectively deprived of the opportunity to obtain a possibly life-saving medical intervention. The court ruled that the administration of a singular dosage of nevirapine to youngsters was deemed indispensable. Due to the pressing nature of children's requirements, the state was obligated to guarantee the provision of protection as outlined in section 28 of the Constitution of the Republic of South Africa. The government was mandated to abolish the restrictions on nevirapine, authorise and facilitate its utilisation when deemed medically appropriate, and adhere to the court's determination that the policy was illegal.

Conclusion and Recommendations

The UNCRC has exerted a substantial influence on children's rights in South Africa, particularly in the realm of socio-economic rights. This has resulted in considerable modifications to the legal framework in order to align with the established criteria set forth by the UNCRC. The manifestation of this phenomenon is most conspicuous in the safeguards for children enshrined in the Constitution, along with the legislative enactments and judicial decisions pertaining to this matter. The rights of children are addressed in a distinct portion of the Constitution known as the Bill of Rights. However, it is important to note that this designation does not suggest that the rights outlined in other portions of the Constitution are not applicable to children as well. The paragraphs on equality, human dignity,

³⁰Heyns & Viljoen (2001).

³¹2001 (1) SA 46 (CC).

³²2005 (5) SA 721 (CC).

religion, education, and health, among other topics, are particularly relevant and applicable to children.

The majority of the civil, political, and socio-economic rights for children that are delineated in the UNCRC have been integrated into the Constitution of South Africa. Additionally, the South African Constitution specifies that in the process of interpreting the bill of rights, a court, tribunal, or forum is required to consider international law and may also consider foreign law. This suggests that while the consideration of foreign law is discretionary, the consideration of international law is obligatory. Furthermore, South Africa has enacted several legislative measures to defend and protect the socio-economic rights of children.

However, it is noteworthy that South African courts have demonstrated a tendency to either overlook or infrequently invoke the UNCRC when dealing with cases concerning individuals under the age of 18. This is in spite of the assurance provided by sections 39(b) and (c) of the Constitution of the Republic of South Africa, 1996. The aforementioned cases serve as illustrative examples in support of this assertion.

- It is interesting that the UNCRC is not mentioned in *Minister of Health & others v. Treatment Action Campaign & others*³³, a case that particularly addresses the rights of children and mothers to healthcare.
- In the case of *Government of the Republic of South Africa & others v. Grootboom & others*³⁴, The court or the legal representatives had the option to reference the relevant sections of the UNCRC, such as Article 6(2) which guarantees the right to life and the utmost feasible survival and development for children, as well as Article 24 which ensures the right to health and healthcare services for children.
- The court, counsel, and amici curiae in *Bhe & others v. Khayelitsha Magistrate & others*³⁵ might have potentially used many articles from the UNCRC to bolster their assertions. These articles include Non-discrimination (Article 2), which emphasises the importance of treating all children equally; the child's entitlement to life and development (Article 6(2)); the child's entitlement to a suitable standard of living (Article 27); and the principle of acting in the child's best interests (Article 3(2)).
- In *Khosa & others v. Minister of social development & others*³⁶, Justice Mokgoro did not make any reference to principles or norms of international law in the case. The court or the counsel could have made reference to the pertinent rights outlined in the UNCRC. Specifically, these rights include the child's entitlement to receive social security benefits as stated in Article 26, the child's right to survival and development as articulated in Article 6(2), and the child's right to enjoy an appropriate quality of life as outlined in Article 27.

³³2000 (5) SA 721 (CC).

³⁴2001 (1) SA 46 (CC).

³⁵2005 (1) SA 580 (CC).

³⁶2004 (6) SA 505 (CC).

South Africa's commitment to fully complying with the terms of the UNCRC and safeguarding children's socioeconomic rights could benefit from further enhancements. The South African government has implemented several measures in order to address these issues, such as improvements in the provision of education, efforts to decrease the incidence of foetal alcohol syndrome, and a campaign aimed at combating child maltreatment. However, the nation remains steadfast in its dedication to preserving and safeguarding the rights of children as delineated in the UNCRC. The Covid-19 pandemic has exacerbated the circumstances, nevertheless, there remains a significant disparity between the demand and supply of these services.

As per the provisions outlined in Section 27(2) of the Constitution, it is incumbent upon the state to undertake appropriate legislative and other measures, within the constraints of its financial capabilities, in order to progressively actualize the entitlement to social security. This section highlights the necessity of implementing additional measures in several domains such as administration, business, economy, social policy, justice, finance, and education, in addition to legislative interventions. According to Cassiem and Streak³⁷, the government bears the responsibility of distributing resources in a manner that expedites rather than incrementally achieves the socio-economic rights of children. It is imperative to allocate a greater proportion of the limited resources to children hailing from disadvantaged households in comparison to other underprivileged groups.

The support provided by the UNCRC to the government's obligation in assisting parents and other legal guardians is deserving of attention. The statement acknowledges that while parents and legal guardians bear the ultimate responsibility for raising their children, states parties are nevertheless obliged to provide them with the necessary assistance, as stated in Article 18. There exists an argument positing that this particular weakness is inherent in nature, hence rendering it inadequate in fully adhering to the principles outlined in the UNCRC. This flaw implies that the state is not obligated to promptly extend aid to economically disadvantaged children who possess parental guardians, nor is it obliged to prioritise the allocation of resources towards impoverished children. It is argued that this represents a limitation in itself and does not fully align with the principles outlined in the UNCRC. This is because it suggests that the government is not obligated to promptly provide for children from low-income families, and furthermore, there is no requirement to prioritise the allocation of resources to impoverished children over other individuals in need.

It is recommended that in order to strengthen the UNCRC's effectiveness in South African courts for the protection of children's socio-economic rights:

- That Presiding officers get ongoing judicial training about the UNCRC and its jurisprudence.
- The Legal Practise Council (LPC) should promote and empower legal representatives to incorporate the pertinent legislation of the UNCRC and

³⁷Cassiem & Streak (2001).

its corresponding case law into their submissions presented before the courts.

- The proposed 5-year LLB programme, which the Council on Higher Education (CHE) is advocating for and urging Institutions of Higher Learning to implement, should incorporate a module on the United Nations Convention on the Rights of the Child (UNCRC) within its curriculum.

The fact that South Africa has made significant efforts to ensure that it complies with the commitments owed to all members of the UNCRC is undeniable. Based on the suggestions put forth by the United Nations in 1990, it can be deduced that the detrimental consequences of poverty can be substantially alleviated by the attainment of goals pertaining to the well-being of children, encompassing areas such as healthcare, nourishment, education, and other pertinent spheres. This conclusion appears to be reasonable based on the findings of the study. However, it is imperative to exert additional efforts to construct a robust economic foundation in order to effectively attain and sustain the objectives of long-term child survival, protection, and development. The South African judiciary has the potential to make a constructive contribution to this undertaking by carefully analysing and consistently applying the provisions of the UNCRC when appropriate and applicable.

References

- Alston, P. (1994). *The best interests of the child: reconciling culture and human rights*. Oxford, UK: Clarendon Press.
- Alston, P., Parker, S. & J. Seymour (1992). *Children, Rights and the Law*. Oxford: Oxford University Press.
- Cassiem, S. & J. Streak (2001). *Budgeting for Child's Socio-Economic Rights: Government obligations and the child's right to social security and education*. Cape Town: Idasa.
- De Wet, E. (1998). *The Constitutional Enforceability of Economic and Social Rights*, Butterworth.
- Devenish, G.E. (1998). *A Commentary on South African Constitution*. Butterworths.
- Dube, F. (2020). 'The South African Constitution as an instrument of doing what is just, right and fair' in *die Skriflig* 54(1), a2601. <https://doi.org/10.4102/ids.v54i1.2601>
- Heyns, C. & F. Viljoen (2001). 'The Impact of Six Major UN Human Rights Treaties in South Africa' in *South African Public Law* 16:28-67.
- Khoza, S. (2007). *Socio-Economic Rights in South Africa*, 2nd ed. University of the Western Cape: Community Law Centre.
- Liebenberg, S. & K. Pillay (eds.) (2000). *Socio-Economic Rights in South Africa: A Resource Book*. Cape Town: Community Law Centre: University of the Western Cape.
- Rautenbach, I.M. (1995). *General Provisions of the South African Bill of Rights*. Butterworths.
- South African Law Commission, Review of the Child Care Act: Executive Summary (Discussion Paper 103, Project 110, 2002) 1.
- Wright, J. & K. Potter (2012). From survival to safeguarding: A history of child protection. *British journal of school nursing*,

Cases

- Bhe & others v. Khayelitsha Magistrate & others* 2005 (1) SA 580 (CC). (15 October 2004)
Centre for Child Law v. Minister for Justice and Constitutional Development and others 2009 (6) SA 632 (CC). (15 July 2009)
Fraser v. Children's Court Pretoria North & others 1997 (2) SA 261 (CC). (5 February 1997)
Government of the Republic of South Africa & others v. Grootboom & others 2001 (1) SA 46 (CC). (4 October 2000)
Khosa & others v. Minister of Social Development & others Mahlaule & another v. Minister of Social Development 2004 (6) SA 505 (CC). (4 March 2004)
Minister for Welfare and Population Development v. Fitzpatrick & others 2000 (3) SA 422 (CC). (31 May 2000)
Minister of Health & others v. Treatment Action Campaign & others (No 2) 2002 (5) SA 721 (CC). (5 July 2002)
S v. Makwanyane & another 1995 (3) SA 391 (CC). (6 June 1995)
S v. Williams & others 1995 (3) SA 632 (CC). (9 June 1995)

Legislation

Constitution

Constitution of the Republic of South Africa, 1996

Statutes

Adoption Matters Amendment Act, 56 of 1998
Basic Conditions of Employment Act, 75 of 1997
Child Care Act, 74 of 1983
Children's Act, 38 of 2005
Domestic Violence Act, 116 of 1998
Films and Publications Act, 65 of 1996
Natural Fathers of Children Born out of Wedlock Act, 86 of 1997
Recognition of Customary Marriages Act, 120 of 1998
South African Schools Act, 84 of 1996

International Treaties

United Nations Convention on the Rights of the Child, 1989
International Covenant on Civil and Political Rights, 1966

