

EDITORIAL

Sibonile Khoza

We are pleased to present the second edition of *ESR Review* for 2003. This edition features recent legislative developments relating to children's socio-economic rights in South Africa.

During the last nine years, South Africa has shown commitment to protecting children's rights in several ways. Key to these was its ratification of the UN Convention on the Rights of the Child in 1995 and the adoption of the 1996 Constitution, which includes special protection for children in section 28. Recently, the country has shown its intention to give legal effect to these commitments through the proposed Children's Bill (the Bill). The Bill is intended to be a comprehensive legislative tool covering a range of issues affecting children and gives prominent attention to children's socio-economic rights.

In this edition, we focus on the Bill as proposed by the South African Law Commission. We evaluate the extent to which the proposed Bill seeks to realise children's socio-economic rights.

Julia Sloth-Nielsen provides an overarching perspective of how the Bill seeks to improve children's access to socio-economic rights. As



A publication by the Community Law Centre (University of the Western Cape)

one of the Bill's drafters, she also provides valuable insights into the thinking behind it.

Giving teeth to constitutional and international law in a comprehensive manner is a vital step in advancing children's access to education. Faranaaz Veriava critiques the Bill's selective incorporation of the international norms relating to children's right to education and proposes a comprehensive review.

Likewise, premising the Bill on a comprehensive approach assists in realising children's access to social security rights. Patricia Martin evaluates the provisions of the Bill relating to these rights.

Marian Jacobs evaluates South Africa's progress in protecting and promoting children's health rights. She highlights the importance of collaborative efforts between the drafters of both the Children's and the National Health Bills to ensure that children's health is given optimal protection.

Lastly, Faranaaz Veriava provides an overview of a case involving the issue of school fees, evaluating the judgment in enforcing the current laws protecting poor families who cannot afford to pay school fees, thereby advancing children's right to education.

SPECIAL FOCUS

THE CHILDREN'S BILL *Children's socio-economic rights and the law*

Protecting children's socio-economic rights through law reform	2
Children's comprehensive social security rights	5
Children's health and the law	7
Towards effective access to education for children	9
Case on education rights	11
Updates	14
Events	15

We acknowledge the invaluable contributions of these authors.

The aim of this edition is to assist both public institutions and civil society organisations to advocate for a strong legislative and policy framework to promote children's socio-economic rights. We therefore trust that it will inform and stimulate vigorous debates aimed at advancing these rights.

ISSN: 1684-260X

A publication of the Community Law
Centre (University of the Western Cape)

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ESR Review

ESR Review is produced by the Socio-Economic Rights Project of the Community Law Centre. The Centre receives supplementary funding from the Ford Foundation. The views expressed herein do not necessarily represent the official views of the Ford Foundation.

Production

Design and layout: Page Arts cc
Printing: Creda Communications, Cape

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Promoting children's socio-economic rights through law reform

The proposed Children's Bill

Julia Sloth-Nielsen

The constitutional protection of children's rights in section 28 of the 1996 Constitution and South Africa's ratification of the UN Convention on the Rights of the Child have provided the impetus for redrafting legislation affecting children, to give effect to constitutional and international law commitments. In 1997, the South African Law Commission (the Commission) was mandated to investigate and review the Child Care Act, 74 of 1983, and to make recommendations to the Minister of Social Development on its reform.

Consequently, after a six-year period of drafting and consultation, the Commission released the Report on the Review of the Child Care Act (the Act) accompanied by the draft Children's Bill (the Bill) in December 2002.

The Commission's primary goal was to replace the Act, which is widely regarded as being inadequate and has been found, in a number of instances, to be inconsistent with the Constitution. The Commission envisaged a comprehensive process.

Accordingly, it not only reviewed the Act, but also examined a wide range of existing legislation, future needs and pressing concerns affecting children in the country. A major concern was the need to improve mechanisms for protecting

children from abuse and neglect, as provided for in section 28(1)(d) of the Constitution.

However, equally significant was a need to focus upon the socio-economic conditions necessary to ensure children's survival and development in line with section 28(1)(c).

It is therefore not surprising that the Bill describes its aims as: 'to make provision for structures, services and means for promoting and monitoring the sound physical, intellectual, emotional and social development of children', and generally to 'promote the protection, development and well-being of children'.

In this sense, child protection - broadly speaking - and children's access to socio-economic rights are viewed as closely intertwined with one another.

They reflect the situation at grass roots level that children are frequently victims of neglect not only through design, but also as a consequence of grinding poverty.

Comprehensive and co-ordinated policy framework

The adoption of a national policy framework is at the centre of the Bill's implementation mechanisms. The draft legislation provides for the Minister of Social Development to develop and publish a national

policy framework, which will bind all three spheres of government, designated child protection organisations and other non-governmental organisations involved in implementing government-aided programmes and projects concerning children.

This national policy framework must, among other things, specify national objectives to secure the well-being of all children. It must spell out priorities and strategies to achieve these objectives and outline performance indicators to measure progress.

Most importantly, it will have to include:

measures to ensure that adequate funds for securing the protection and well-being of all children in the Republic, including such funds as are required for the implementation, enforcement and administration of this Act.

The national policy framework envisaged by the Commission will be a valuable tool in setting government objectives to deliver on the socio-economic rights contained in section 28(1)(c). In effect, it will constitute a programmatic plan to address and advance children's material conditions.

This approach is supported by the reasoning of the Constitutional Court in *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) (hereafter *Grootboom*) insofar as it required government – within the context of the right of access to adequate housing – to devise and implement a comprehensive and co-ordinated programme to progressively realise socio-economic rights.

Early childhood development

The Bill's other provisions highlight further areas for policy development.

One example relates to a provision for formulating 'a properly resourced, co-ordinated and managed early childhood development system'. Early childhood development concerns the process of emotional, intellectual, physical and social development of children from birth to nine years of age.

The idea of focusing on young children is supported and regarded internationally as key both in the quest to prevent child abuse and neglect, and in promoting optimal child development.

Thus, the inclusion of the childhood development aspect in the legislative framework is a novel step towards meeting international and constitutional obligations.

Prevention and early intervention

Another novel feature of the Bill is its inclusion of the provision on prevention and early intervention services. The Bill provides that a national policy will have to be formulated for rendering those services that seek to preserve family structures, and develop parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of children within the family.

Intervention services should be aimed at promoting children's well-being and realising their full potential. They should also ensure that the removal of children from families is avoided and child neglect and abuse are prevented.

The inclusion of the childhood development aspect in the legislative framework is a novel step towards meeting international and constitutional obligations.

These services should be aimed at preventing the recurrence of problems in the family that may harm children or adversely affect their development.

Furthermore, the Bill specifies that the national policy will have to include issues concerning the distribution of resources among all spheres of government to provide for early intervention and prevention services.

It will also have to spell out how capacity building must occur at all levels of government in order to deliver these services.

This aspect of the policy is premised on the principle that redirecting resources towards children of the most tender age category will decrease the possibility of their becoming the victims of social ills

The national policy will have to spell out how capacity building must occur at all levels of government in order to deliver prevention and early intervention services.

This Bill is an effort to to advance children's access to their constitutional rights in a SMART (specific, measurable, achievable, realistic and time-linked) manner.

such as neglect, abuse, malnutrition and stunting. The provisioning of these services will, it is believed, prevent children from becoming vulnerable to dislocation from their families and ending up on the streets, as well as being involved in delinquency, child labour or commercial sexual exploitation.

The socio-economic dimensions of the Bill's focus on prevention and early intervention are even more evident from its provisions on the role of local government in delivering these services.

The Bill requires municipalities to keep statistics on specified groups of children, such as street children or children living in child-headed households. They must also undertake a needs analysis of the children in their jurisdiction every three years, and 'apply those statistics and such needs for the purposes of budgeting and the provision of services, including...access to basic nutrition, shelter, health care and social services' for those categories of children.

This provision recognises that identifying children whose socio-economic rights are not being fulfilled needs to happen at grassroots (municipal) level, in order for delivery to be better targeted.

Children in especially difficult circumstances

Significantly, the Bill also focuses on providing protection to specified groups of most vulnerable children.

The Bill defines these as children in especially difficult circumstances, including those children affected by malnutrition and HIV/AIDS, children with disabilities and chronic illnesses, those living in child-headed households, those living or working on the streets and children who are subject to exploitative labour practices and commercial sexual exploitation.

The Bill proposes that specific strategies be adopted in the national policy framework to deal with their needs. For example, children affected by malnutrition must be provided with sufficient and appropriate food, including emergency measures, and those that are impoverished should be given free access to health care services.

The national policy framework should also provide for incentives to private sector health care institutions to assist impoverished children with access to their services.

The court-ordered emergency grant

Securing children's immediate survival needs is further enhanced by the proposed introduction of a court-ordered emergency grant, which would ensure that where a child is at risk of removal into alternative care purely because of poverty, the court would be able to get immediate assistance to the child's parent or primary care-giver.

This is one of an array of proposed grants. The emergency grant

- and the extension of other grants - represents a host of provisions in the Bill relevant to children's access to socio-economic rights.

They illustrate the drafters' comprehensive vision that the fulfillment of children's rights is intertwined with access to social security.

The Bill does not determine the amounts that would be payable for any of the proposed grants, nor whether existing grants would be payable at the same level of benefit as they are at present. This function is assigned to the Minister of Social Development to determine, taking into account available financial resources.

This article has highlighted only those parts of the Bill that affect, and seek to improve, children's access to socio-economic rights. There can be little doubt that this Bill is an endeavour to use the window of opportunity created by the legislative drafting process to advance children's access to their constitutional rights in a SMART (specific, measurable, achievable, realistic and time-linked) manner.

The overall product is progressive, situation- and needs-related, and makes a leap forward in addressing our international obligations.

In conclusion, implementation of the Bill described above would lead to measurable gains for children in the socio-economic rights arena.

 Julia Sloth-Nielsen is Professor of Law and Senior Researcher in the Children's Rights Project of the Community Law Centre, University of the Western Cape.

The Children's Bill

A suitable vehicle for children's comprehensive social security rights

Patricia Martin

South Africa has taken a bold step to giving legal effect to children's rights in a comprehensive manner. The draft Children's Bill (the Bill), originally meant to replace the Child Care Act of 1983, is a holistic piece of legislation that incorporates a host of wide-ranging laws relating to children. It includes a network of provisions on, among other things, parental rights and responsibilities, children in especially difficult circumstances, prevention and early intervention, and social security for children. Of particular note is that it places the role of social security at the centre of the comprehensive child protection system.

There is a significantly synergy between the Bill's comprehensive approach to the child protection system and the role of social security within that system, on one hand, and the social security vision of the Alliance for Children's Entitlement to Social Security (ACCESS), on the

other. ACCESS's social security vision is a multi-faceted, effective and comprehensive protection system for children made up of a range of grants, benefits and services that will realise this shared objective.

The degree of synergy between the two visions reflects a shared ideological foundation. This foundation informs most of the structure and content of the Bill. Viewed thus, ACCESS believes that the Bill is potentially the ideal vehicle for realising its social security vision and objectives. It accordingly supports the Bill, though with some reservations. These reservations are premised on certain contradictory aspects of the Bill that are not consistent with its fundamental ideological underpinnings. They not only erode rather than further the objectives of this draft legislation, but are also inconsistent with the widely-shared objectives of a comprehensive social security system envisaged by ACCESS.

ACCESS's envisaged social security package

It is important to provide some of the key elements of ACCESS's envisaged comprehensive social protection system and to evaluate the extent to which the Bill takes these forward.

ACCESS envisages a social security package comprising cash grants, services and benefits such as quality education, transport, food, adequate and quality health care, water and sanitation, as well as social welfare services.

At present, children do not receive this package. Instead, for the few who qualify, assistance is limited mainly to a cash grant in the form of the Child Support Grant (CSG). Consequently, the CSG is being used to pay for supplementary services such as education and health, rather than basic essentials such as food.

The Bill identifies certain rights of children as constituting the core of the child protection system. These rights largely coincide with the package of grants, benefits and

ACCESS is an alliance of 400 children's sector organisations, ranging from community- to faith-based organisations, to academic institutions and service providers. All of its members are committed to realising the same objective, namely a comprehensive social security system that allows all children to survive and develop to their full potential.

Recommendations of the Children's Bill regarding the range of grants:

- Universal Child Support Grant
- Kinship Care Grant
- Adoption Grant
- Emergency Court Grant
- Supplementary Special Needs Grant and Subsidies for Assistive Devices

The fracturing of services and benefits detracts from the notion that social security for children should take the form of a holistic and comprehensive scheme.

services making up ACESS's envisaged social security system. These are specified in Chapter 4 of the Bill and they include the right to protection from maltreatment, abuse, neglect, degradation, exploitation and other harmful practices as well as access to child and family courts.

The list also includes a host of children's socio-economic rights such as the right to education, basic health care, social security, including access to social assistance, food, and special care and financial assistance for children with special needs due to disability or chronic illness.

However, this list of core rights is not sufficiently comprehensive to realise the objective of enabling a child's growth and development. For example, it does not include the right of access to such basic services as water and sanitation, and transport. It only makes limited provision for subsidised transport for children in alternative care.

This is not adequate. These rights ought to be included in the list of core and universally applicable rights set out in Chapter 4.

In addition, the social security scheme provided for in Chapter 23 of the Bill is limited to the provision of cash grants and subsidies. Its terms of reference do not include any services and benefits. These

are, to some extent, provided elsewhere in the Bill but outside of the social security framework. This fracturing of services and benefits detracts somewhat from the notion that social security for children should take the form of a holistic and comprehensive scheme.

The Bill therefore does not contribute to a common and shared understanding of these grants, services and benefits as constituting the core components of a comprehensive social security system.

In turn, this may perpetuate the current fractured social security discourse, which has fostered the often-unhelpful failure to recognise that social security is a comprehensive package that needs a holistic service delivery ethic.

Universal access

A fundamental tenet of any effective comprehensive child protection system must be the guarantee of access by all poor children to system's grants, benefits and services. At present, the application of South Africa's social assistance excludes millions of poor children. As a first step to achieving universal access, ACESS is of the view that the CSG should be extended to all children below the age of 18.

However, the Bill endorses the principle of universality in a number of ways and takes steps in line with this principle. For example, it defines 'every child' as all children under the age of 18.

It also eliminates the means test currently used to determine eligibility for grants, benefits and services. In terms of the social security scheme, the Bill provides for a 'child grant which is payable on a *universal basis* in respect of all children in need who are South Afri-

can citizens and resident in the Republic'. In other words, the Bill extends the equivalent of the current CSG to all children below the age of 18.

The Bill also takes a further step towards achieving full universality by simplifying the means test, where it is retained - for instance, for the court-ordered kinship care grant, the informal kinship care grant, the adoption grant, the emergency court grant, and the supplementary special needs grant. However, this test is a simple and cogent needs-based assessment rather than the current complicated one based on the child's household's income.

Despite the simplification of the means test, the question that must be asked is why the Bill, having embraced the underlying principle of universality, chooses to retain it at all?

Poor children without adult care-givers

Currently, children without adult care-givers - such as those in child-headed households and street children without parents - are excluded from the social security system. The existing system requires that all applications for grants to be made by an adult primary care-giver.

The Bill draws children without adult primary care-givers into the social security net. It provides that the social security scheme:

must be administered in such a way that it reaches children in especially difficult circumstances such as children heading households, or children, who for various reasons, are at risk of abandoning their education to take up adult responsibilities or leaving the home environment.

It also provides for the introduction of a mentor scheme as the practical way forward in this regard, which envisages allowing an alternative individual or organisation to act *in loco parentis* for the child without an adult care-giver, allowing them to apply for, receive and administer the grant on the child's behalf.

Children with special needs

Currently, the relevant grant for children with special needs, namely the Care Dependency Grant, is not available to children with chronic illnesses, including HIV/AIDS, or children with moderate disabilities.

The Bill makes express provision for children with special needs who are currently excluded by the system. It makes provision for a Supplementary Special Needs Grant and Subsidies for Assistive Devices for disabled children, including the moderately disabled, and chronically ill children, which is expansively defined to include HIV/AIDS.

Once again the question remains: why has the Bill sought to retain a means test, rather than a needs-based assessment tool for determining eligibility for these forms of social assistance?

Consultative and co-operative process

There is a common and shared understanding and recognition among the public, civil society, and, to a far lesser degree, among decision-makers and relevant government departments, that the key elements discussed above constitute the core components of a comprehensive

social security system. There is also consensus in realising that this holistic package requires an integrated and co-operative inter- and cross-departmental acceptance of responsibility for its delivery. Thus, both the formulation and implementation of this piece of legislation will require a vigorous consultative and co-operative process between relevant actors, particularly including civil society and organised children's welfare professionals such as social workers, court workers and the like.

The Bill is a step in the right direction. The notion of a comprehensive approach it subscribes to is a suitable vehicle for the children's social security system. It is to a large extent in line with that envisaged by ACCESS, though with some missing pieces to the puzzle.

The government has committed itself at the highest level to realising a comprehensive social security system in 2003. If this commitment is anything to go by, we will see the introduction of the Bill in Parliament during the course of the year. However, this process must be preceded by an extensive consultative process among key role players before the introduction of the Bill in Parliament.

 Patricia Martin is National Co-ordinator of ACCESS

UPDATE

The chapter on social security has now been removed from the proposed Children's Bill and will instead be incorporated in the Social Assistance Bill. See page 15 of this edition.

Children's health and the law

Marian Jacobs

The health of the South African population, as in many other countries, is governed and protected by a wide spectrum of legislation. This ranges from the Health Act of 1977 (currently being revised as the National Health Bill) to those laws related to certain aspects of risk to health, such as the Hazardous Substances Act of 1973. Protecting and promoting the health of children is also subject to the same laws. In addition to these general laws, children's health is also protected in child-specific legislation, namely the Child Care Act of 1983, currently being re-drafted as the Children's Bill.

Commitment to children's health

South Africa showed commitment to protecting and promoting children's health when it ratified the UN Convention on the Rights of the Child (the CRC) in 1995 and subsequently adopted the 1996 South African Constitution, which includes a special provision guaranteeing the right of every child to health care services. Both accord specific protection to children's rights to health care services, in Article 24 and Section 28 respectively.

The process that led to the above commitments can be traced to the some of South Africa's earlier undertakings. These include adopting the Goals of the 1990 World Summit for Children and set-

Both Bills are regarded as vehicles for translating these commitments into reality.

ting up a Commission on Maternal, Child and Women's Health in 1994 to investigate circumstances relating to children's health. This Commission proposed a set of guidelines for national children's health policy and programmes and recommended that there should be a link with special provisions for children's health in the law at large.

It is against this backdrop that both the Children's and National Health Bills are regarded as vehicles for translating these commitments to children's health into reality.

Limited reach of the law

The recent drafting process of the two Bills has highlighted some of the limitations of each in supporting the wide-ranging proposals for children's health care services. The current version of the Children's Bill makes provision for a very narrow scope of care, promotion and protection of children's health. For example, it mentions basic health care services and a national policy framework, but omits both the detail of the services required and the processes for securing policies for children's health. Of note is the fact that health services have paid scant attention to giving children a voice in matters regarding their health care, such as consent for procedures and treatment.

The National Health Bill is even less child-friendly. It mentions chil-

dren minimally in the introduction and makes no provision for those with special needs. Its promise 'to improve the quality of life of our nation's people and increase their life expectancy' has thus far fallen short of acknowledging children as an important sector of our population, leaving them in as vulnerable a position as before.

What are then the challenges to the drafters of both Bills to make provision for rectifying the defects? In addition, what are the options for progress to ensure that children's health needs are given appropriate consideration by the law?

Legislative protection needed

Both the CRC and the Constitution provide a framework for determining the scope of legislative provision required. They recognise the right of a child to health care alongside a host of other relevant rights for ensuring the child's growth, development and survival. These include the rights to life, equality, education, social services and social security, as well as to special care. Other relevant rights for children's health include the right to a family environment and to be protected from abuse, neglect and maltreatment. These rights are key pointers for determining the scope of legislative protection that is needed to ensure not only children's health, but also their development and survival.

The challenges to the drafters of the Children's Bill are therefore huge. First, they need to seek greater collaboration with those drafting the Health Bill to find ways in which the wide scope of legislative requirements in support of chil-

dren's rights to health care services can be met. Second, both teams of drafters need to reach an agreement on the content areas of law regarding health care services. They need to agree on:


- whether or not the regulatory provisions on children's health rights should be located in the Children's Bill or the National Health Bill;
- the definition of the basic package of services for each child;
- the promotion of equity of access to health care and consent to treatment, especially in circumstances where there is no care-giver;
- recognising that the health sector's equity goals - with decentralisation of services as a core strategy - need to underpin recommendations for child health services with regard to both facilities and providers of care; and
- ensuring that children have a voice in matters involving their health care services.

The law also needs to be clear on the responsibility of different levels of government in delivering services to children, taking into account the convergence with local government policies. Finally, the law should strengthen the government's commitment to finalise policies for children's health, to ensure adequate resourcing for children's health services in line with the 'best interests' principle, and should promote collaboration with laws governing a wide array of sectors from early childhood development, through education, social development and justice to finance.

Despite significant progress over

the last decade in promoting a rights-based approach to children's health in South Africa, the agenda remains huge. Taking cognisance of the full scope and detail of the unfinished agenda, the drafters of these Bills need to meet and discuss which legislative framework will be most appropriate to provide for the realisation of children's rights to health. While the Children's Bill should provide the broad framework within which the obligation of the health department to elaborate specific legislation to govern children's health is prescribed, the detail of such legislation should be included in the National Health Bill.

Further discussion is also needed on how legislation can entrench the gains that we have made in children's health since 1994 and ensure continued progress in this regard. A collaborative effort by the two teams of drafters and other relevant stakeholders can make a vital contribution to the national efforts towards seeking greater compliance with the requirements of both the CRC and the Constitution.

 Marian Jacobs is Director of the Children's Institute, University of Cape Town

See also:

Karrisha Pillay 'The National Health Bill: A step in the right direction?' 3(2) *ESR Review* 2002, 11–13.

Karrisha Pillay 'Universal access to health care: Are we any closer to our goal?' 3(1) *ESR Review* 2002, 21–22.

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Towards effective access to education for children

The need for a comprehensive review

Faranaaz Veriava

The proposed Children's Bill (the Bill) provides a promising outline of the right to education. Section 21 of the Bill attempts to define South Africa's obligations in respect of education under international law, one of the Bill's objectives being giving effect to the country's obligations concerning the well-being of children in terms of binding international instruments. The Bill also elaborates on the specific entitlements that make up the right to education under section 29 of the 1996 Constitution, and explicitly states that children's rights in the Bill supplement those enshrined in the Constitution.

It is crucial that section 21 fulfils this dual role, for two reasons: first, because South Africa ratified both the Convention on the Rights of the Child (the CRC) and the African Charter on the Rights and Welfare of the Child (the AfCRWC); and second, because section 29 of Constitution guarantees, in broad and undefined terms, the right to basic education. Section 21 can provide guidance to both individuals and policy makers as to the scope and content of the right.

In respect to the latter point, it is noteworthy that the Constitution guarantees the right to education in a slightly different manner from other socio-economic rights (e.g. access to adequate housing, health

care services, sufficient food, water, and social security in sections 26 and 27). The latter rights are qualified to the extent that they are made subject to the adoption of 'reasonable legislative and other measures', 'within [the State's] available resources', 'to achieve the progressive realisation' of these rights.

In contrast, the right to education is unqualified.

Thus, the approach adopted by courts thus far in respect of the qualified rights (e.g. in the *Grootboom* case) is likely to be different to that it would adopt when interpreting the right to education.

Instead of determining whether or not a government programme is reasonable in giving effect to its obligations in terms of a particular right, the court's approach in respect of the right to education is likely to involve an enquiry into the right's content. That is, the court will have to deter-

It is noteworthy that the Constitution guarantees the right to education in a slightly different manner from other socio-economic rights in that it is an unqualified right.

Our courts have yet to comment on whether s29(1) of the Constitution can be interpreted to mean that schooling should be free.

mine which entitlements the right guarantees, and whether or not the state has 'provided adequately' in terms of these entitlements.

Analysing section 21

International obligations

The structure of section 21 is similar to that adopted by both the CRC and the AfCWRC in their respective provisions on the right to education. Each has a section defining the content of the right to education and another that sets out the objectives to be achieved by the guarantee of this right. Sections 21(1) and 21(2) of the Bill set out the content and objectives respectively. However, section 21(1) appears to borrow selectively from the content of the rights as set out in

the international instruments. For example, the right of a child to have access to educational and vocational information and guidance guaranteed in section 21(1)(b) is similar to the wording of the entitlement set out under article 28(1)(b) of the CRC. However, other crucial entitlements provided by the CRC and the AfCWRC, such as provisions making primary education compulsory and available free to all, and provisions requiring that secondary education be made progressively free and accessible to all, are not included in section 21 of the Bill. Thus, the inclusion of only certain entitlements appears to be arbitrary. A thorough incorporation of South Africa's international obligations into domestic law requires a more detailed scrutiny of the nature and extent of these obligations.

Defining the content of the right to education

In defining the entitlements that make up the right to education, it is also necessary to determine the material conditions necessary for the enjoyment of the right and define the extent of the state's obligations in respect thereof. Examples of some important omissions from the Bill are highlighted below.

The availability of sufficient functioning education institutions and programmes is essential to enable learners to acquire knowledge and to develop. The *School Register of Needs Survey* published in 2000 documents that 35.5 % of the country's schools were without access to telecommunications, 28% had no access to water, 42.9 % had no access to electricity, and 34% reported weak or very weak build-

ing structures. Despite these obvious deficiencies in the provisioning for schools, none of the entitlements set out under section 21(1) provides guidance on the extent of the state's obligations to provide schools that are functional and adequate, and that will enable children to acquire knowledge and to develop.

School fees

It is also essential that learners have economic access to education. The most significant omission from section 21 is therefore an elaboration of the state's obligations regarding schools fees. Our courts have yet to comment on whether the broad protection provided by section 29(1) can be interpreted to mean that schooling should be free or merely that education should not be denied to those that cannot afford to pay schools fees. (See page 10 in this issue.)

The South African Schools Act (SASA) allows schools to charge fees but also gives individual schools the power to decide whether or not they should do so. It then provides an exemption system for those parents and care-givers who cannot afford to pay the fees. SASA also makes it unlawful for schools to turn away learners or exclude them from school activities for not paying their fees. However, the efficacy - and arguably, the constitutionality - of this system has become the subject of increasing debate.

On 16 September 2002, the Minister of Education, Kader Asmal, announced a review of all mechanisms and policies related to school funding. In a press release he said:

I am also disturbed by reports of poor learners being forced to pay

The court's approach to the right to education is likely to involve an enquiry into the right's content rather than whether or not the government's programme is reasonable.

school fees or face exclusion. The law stipulates that parents or guardians who do not have sufficient income relative to the school fee are automatically exempted from paying fees. Sadly, many schools are breaking the law.

A Bill that carefully takes cognisance of the difficulties faced by poor learners in accessing education, and which furthermore seeks to give effect to its international obligations in respect of school fees as set out in the CRC and the AfCWRC, could more effectively guide policy makers to make laws which give effect to, rather than impede, the enjoyment of the right to education.

While the inclusion of section 21 in the Bill should to be welcomed, the extent to which it gives full effect to its obligations under international law and elaborates on the protection afforded by the right to education in the Bill of Rights requires a comprehensive review.

 Faranaaz Veriava is a legal researcher in the Education Rights Project at the Centre for Applied Legal Studies

See also:

Mandla Seleokane 'A right to free basic education for all', 3(1) ESR Review 2002, 26

Faranaaz Veriava 'Eradicating barriers to education: An introduction to the Education Rights Project', 3(2) ESR Review 2002, 13-15.

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Enforcing the current laws on school fees

***Sorsa and Sorsa v Simonstown School*
Magistrates Court, Case 2759/02, 29 May 2003**

Faranaaz Veriava

There is an emerging scholarly debate on whether or not charging school fees is constitutional in terms of the Bill of Rights. Further, if it is unconstitutional, would a challenge to the state policy of allowing schools to charge fees be more likely to succeed as a violation of the right to equality (section 9) or the right to basic education (section 29(1)(a))? While constitutional scholars continue to make vigorous arguments for and against the abolishment of school fees, the immediate consequences of not paying school fees for poor families are dire.

Complaints received by the Centre for Applied Legal Studies (CALs) detail how schools are disobeying the existing laws on school fees. Learners from poor families remain vulnerable in these schools, which withhold their reports, deny them access to the schools' facilities, or send them home because their parents have not paid the fees. This situation prevails despite the existing laws protecting learners from being discriminated against and from being excluded from schools if parents have not paid the fees. In addition, some schools are threatening poor parents with legal action for arrears even if they are legally exempted from paying school fees. This eve-

ryday reality for many parents and their children makes it necessary that initiatives on education rights focus not only on the arguments for abolishing fees, but also on ensuring that the current laws to assist poor families are enforced.

In April 2003, CALS launched an application on behalf of Mr and Mrs Sorsa (the applicants) in the case of *Sorsa and Sorsa v Simonstown School* in the Simonstown Magistrates Court, to enforce the laws protecting families who cannot afford to pay school fees. On 19 November 2002, Simonstown School (the school) obtained a default judgment against the applicants in the sum of R24 174 for school fees unpaid from the 1998-2002 period. The purpose of the application was to rescind or set aside the judgment.

The facts

The applicants have two daughters at the school. The fees for the older daughter, in Grade 11, and the second daughter, in Grade 5, are R3 500 and R2 500 per annum respectively. The applicants moved to Simonstown in 1998 from the West Coast after they had been sequestered. Their founding affidavit details a history of financial deterioration following the sequestration that made it impossible for them

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to afford the fees charged by the school. The applicants have an average monthly income of R931 after paying for their insolvency debts, rent and electricity, which is used to pay for food and clothing and other daily subsistence necessities for their family of five.

When the applicants' daughters began attending the school in 1998, the applicants entered into an informal agreement with the previous school principal to pay school fees of R50 per month per child. This agreement was to continue until their financial situation

improved and they were able to pay the full amount of school fees requested by the school. The applicants, however, asked the school principal whether there was a 'subsidy' for parents who could not afford to pay school fees. At the time the applicants did not know that the term used in law to describe assistance to parents who cannot afford to pay school fees is not 'subsidy', but 'exemption'. They were told that the school did not provide any subsidies to parents. The agreement lasted until May 2000 when the applicants' financial hardships worsened and they stopped paying anything toward their children's school fees.

In 2001 a new school principal was appointed, under whom the applicants were asked to pay the full school fees. The applicants explained their financial situation to the school and asked if they could not get a subsidy from the school to assist them. Again they were told

that the school did not provide subsidies to parents who could not afford to pay school fees. On 13 November 2002 the applicants received a summons from the school claiming arrears school fees of R24 174. A default judgment was granted against them on 19 November 2002.

The issues

For a court to rescind or set aside a default judgment, the applicants have show 'good cause' why this should be done. In this case the applicants had to set out the grounds for their defence against the school's claim for arrear fees and the reasons why they did not appear in court to defend the school's claim on the day the default judgment was granted in favour of the school. The latter means, in legal terms, the applicants had to show that they were not in wilful default of appearance in court.

A SUMMARY OF THE RELEVANT PROVISIONS OF THE 1996 SCHOOLS ACT AND THE 1998 REGULATIONS

Section 39 of SASA provides that a school may only charge school fees when a majority of parents attending the annual budget meeting adopts a resolution to do so. It also provides that parents must determine the amount of fees to be charged at this meeting along with criteria to exempt those parents who are unable to pay fees. Regulation 3(1)(a) as read with 5(3) set the parameters that schools must abide by when determining an exemption policy: A school must fully exempt parents whose income is less than ten times the annual school fee, and partially exempt those whose income is less than 30 times but more than 10 times the annual school fees. Regulation 4(1)(a) obliges the school governing body to notify parents in writing

of the amount charged by the school and of the criteria and procedures for exemptions. Regulation 5(2) obliges the school governing body to take into consideration certain factors when considering an application for an exemption including, among others, the parents' total annual necessary expenses, their assets and liabilities, number of dependants, standard of living and any other information relevant to the granting or denial of an exemption. In terms of Section 40 of SASA, a school can only sue parents for non-payment of fees where it has correctly determined its fees and exemption policy and where parents have not applied for an exemption but have failed to pay the fees set by the school.

The applicants' defence

The applicants' defence was that the school's claim for arrear school fees was invalid because the school had failed to abide by the laws relating to school fees as set out in the South African Schools Act of 1996 (SASA) and the Exemption of Parents from the Payment of School Fees Regulations, 1998 (the Regulations). These laws provide that parents who cannot afford to pay school fees are entitled to an exemption, and a school is only entitled to sue for arrear fees when a parent is not entitled to an exemption.

According to the laws summarised on page 12, the applicants would be entitled to at least a partial exemption or even full exemption from paying school fees. Their annual gross income is R38 056.33. In terms of the formula set out in the Regulations, a parent whose annual gross income is less than R35 000 would be entitled to a full exemption while one whose annual gross income is less than R105 000 would be entitled to a partial exemption.

Any consideration of an exemption application would also have to take into consideration other factors such as the deterioration of the family's financial circumstances and the fact that the applicants had two daughters attending the school.

The applicants had, despite clearly being eligible for an exemption, never received in writing a copy of the fees policy informing them of the amount charged at the school and the criteria and procedure for applying for an exemption.

Instead, they were repeatedly told by the school officials that the school did not provide exemptions

(what the applicants unknowingly referred to as 'subsidies'). This prevented them from applying for an exemption.

The applicants argued that the school had disobeyed the law by failing to inform them of their rights to apply for such an exemption. As a result, they applicants were unable to obtain an exemption from paying school fees for the years 1998-2002 (which resulted in an accrual of their debts to the school). They therefore argued that the school's claim for arrear fees was invalid.

Concerning their absence in court on the day the default judgment was granted, the applicants founding affidavit details the efforts they made to respond to the school's claim against them after being served with summons.

Mr Sorsa attempted to negotiate a settlement with the school, which he believed had been accepted. On 18 November, he received a telephone call from the school informing him that legal action was to go ahead against him.

When he attempted to inform the school's attorney of his attention to defend the action, the attorney informed him that judgment against him had been given that morning, though the court record showed that judgment was only granted the following day.

The decision

The magistrate was satisfied that the applicants had shown 'good cause' for why the default judgment should be rescinded or set aside. This meant that the applicants would be able to defend the original summons against them.

A legal basis exists to challenge the claims of schools where such claims are made without allowing proper procedures for determining school fees and without informing parents of their right to exemptions.

The school has since completely withdrawn its claim against them.

This case, as well as many other complaints received by CALS, suggests that schools use the existing laws relating to school fees selectively. Schools fail to adopt lawful exemption policies, or inform parents of the existence of such policies and in some circumstances even prevent parents from applying for exemptions, but then proceed to sue for arrear school fees.

This judgment is therefore useful for the thousands of parents throughout South Africa who are being threatened with legal action for not paying school fees.

It illustrates that a legal basis exists to challenge the claims of schools where such claims are made without allowing proper procedures for determining school fees and without informing parents of their rights to exemptions.

This case suggests that schools use the existing laws relating to school fees selectively.

As long as schools have to rely on school fees to supplement insufficient budgets, the incentive to disobey exemptions policies will remain and poor learners will constantly face hurdles in accessing their right to education.

At the same time, challenges to unlawful actions by schools illustrate the problems with the current system.

As long as schools have to rely on school fees to supplement insufficient budgets, the incentive to disobey exemptions policies will remain and poor learners will constantly face hurdles in accessing their right to education.

On 14 June 2003 the Department of Education presented a plan to 'improve access to free and quality basic education for all'. In terms of this plan only the very poorest of schools will no longer charge school fees, while the majority of schools - many of which number poor learners among their pupils - will continue to determine their fees.

It is therefore imperative that we remain vigilant and challenge the current system where necessary to ensure that all learners have access to quality education.

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The Children's Bill

The Children's Bill, finalised by the South African Law Commission in December 2002, was handed over to the Department of Social Development in January 2003.

At the briefing of the Portfolio Committee on Social development on 28 May 2003, the Department indicated that there would be substantial changes in the Commission's draft Bill. A revised Bill would be ready on 9 June for the Minister's approval and would be submitted to the Cabinet committee on 18 June.

The minutes of the briefing (available at <http://www.pmg.org.za>) make it clear that there are a number of changes to the Commission's draft Bill. For instance, the Department is not following recommendations to revamp the children's courts and establish a new, centralised child and family court system. Instead, it aims to stay with the present system of children's courts and build on that structure while allowing for the future development of family courts by the Department of Justice.

As far as the provision of social security and grants is concerned, the Commission developed a comprehensive social security scheme for children, which provides for a variety of grants and subsidies and sets out the relevant eligibility requirements. The Department, however, indicated that all aspects of Bill relating to the administration of social security should be removed and placed in the Social Assistance Bill.

The Bill was not submitted to the Cabinet Committee on 18 June 2003, but it is expected it will be af-

ter the current parliamentary recess. Once it has been approved by Cabinet, certified and introduced into Parliament, it will be debated by the Portfolio Committee on Social Development. Civil society will then be given an opportunity to make submissions to the Committee on its content.

If passed into law as envisaged by its drafters, the Bill will not only replace the Child Care Act of 1983 but also a host of other legislation relating to children, including the:

- Age Majority Act 57 of 1972;
- Children's Status Act 82 of 1987;
- Guardianship Act 192 of 1993;
- Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996; and
- National Fathers of Children Born Out of Wedlock Act 86 of 1997.

The Bill, the Report and other relevant documents can be accessed on <http://www.server.law.wits.ac.za/salc.html>.

For the submissions of the children's sector on the Bill, see <http://www.uct.ac.za> and/or <http://www.ac.org.za>.

The National Health Bill

The National Health Bill hearings will take place on 11-13 August 2003. For more information contact the Secretary of the Portfolio Committee on Health, Mr Saazi Vuke (ph. 021 403-3770, fax 021 403-2725). Newspaper advertisements will invite submissions on the Bill.

Other forthcoming legislation

The Social Assistance Bill

This Bill is expected to be tabled in Parliament by August 2003.

The following organisations made a joint submission on the Bill in January 2003: Community Law Centre (UWC), Black Sash, Alliance for Children's Entitlement to Social Security (ACCESS), Children's Rights Institute and the South African Federal Council on Disability. For this submission, please contact Sandy Liebenberg of the Community Law Centre on 021 959-2950 or sliebenberg@uwc.ac.za.

The National Social Security Agency Bill

This Bill will be introduced in Parliament by August 2003.

The joint submission of the Community Law Centre (UWC), Black Sash, NEHAWU, Legal Resources Centre, ACCESS, Nadel Human Rights Research and Advocacy Project, South African Council of Churches (SACC) and South African Catholic Bishops Conference (SACBC) can be accessed on www.communitylawcentre.org.za/ser.advocacy.

The Social Relief Fund Bill

This draft Bill is expected to be tabled in Parliament in September 2003.

The draft Food Security Bill

This Bill has not been officially published yet. However, the Department of Agriculture has indicated that it will be tabled in Parliament before the end of 2003.

The ESCR-Net launched in style Chiang Mai, Thailand (8-11 June)

The International Network on Economic, Social and Cultural Rights (ESCR-Net) was launched in Chiang Mai, Thailand in early June. Drawing more than 2000 participants from around the world, the inaugural conference was attended by activists and academics in the field of economic and social justice, by members of social movements and representatives of the donor community.

Mrs Mary Robinson, who attended the conference as a guest of honour, delivered a keynote address heralding the ESCR-Net as a significant step in the direction of ensuring that the formal acknowledgement of the indivisibility of all rights translates into reality.

The conference provided an opportunity for activists and others committed to human rights and social justice to meet, share strategies and experiences, and construct a common platform for agitating for economic and social justice.

Both general and specific topics were discussed. Among those that attracted popular attention were private sector responsibility for human rights, privatisation of basic services, globalisation and human rights, state violence and socio-economic rights violations, and adjudication of socio-economic rights.

The discussions identified areas in which the ESCR-Net would play

a role in tackling the topical issues involved.

The launch was signified by the appointment of new members to the Board on 11 June. The Board has been mandated to formulate the governance structure of the ESCR-Net.

The ESCR-Net is the largest-ever collaborative initiative on economic, social and cultural rights. Its aim is to facilitate collaboration among its members and groups in the arenas of information and resources exchange, development of a collective voice, promotion of the ESCR approach to poverty reduction strategies and of fair economic, social and cultural policies at all levels.

Sibonile Khoza and Danwood Chirwa represented the Socio-Economic Rights Project of the Community Law Centre at the conference.

The Project wishes to thank the organisers of the conference for their devotion and commitment, which made the launch a success.

Special thanks are also due to Mr Geoff Budlender of the Legal Resources Centre (South Africa) for representing South Africa in the Interim council during the period 2000-2003.

As is always the case, the challenge remains translating the promise of the launch into practice.

The outcomes of the conference will be posted on the ESCR-Net's website, www.escr-net.org.

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Subscribe to our electronic newsletter by:
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CALL FOR CONTRIBUTIONS/LETTERS

We welcome contributions and letters relating to socio-economic rights. Contributions must be no longer than 1 500 words in length and written in plain, accessible language.

All contributions are edited.

Please email contributions to Sandy Liebenberg at
sliebenberg@uwc.ac.za

FEEDBACK ON *ESR REVIEW*

Thank you very much to those readers who took time to complete the survey forms included in the previous edition. For those who have not yet completed the forms and would like to do so, they are available online at
www.communitylawcentre.org/ser/esrreview_survey.php
where they can be submitted by simply clicking on 'send' after completion.

This and previous issues of
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