

Equality rights and children: Moving beyond a one-size-fits-all approach

Sandra Liebenberg (Faculty of Law, Stellenbosch University)ⁱ

Equality is both a founding *value* of the South African Constitution, and a fundamental *right*. As a founding value, along with human dignity and freedom, equality must underpin how courts, tribunals or forums interpret the Bill of Rights. As a fundamental right, equality requires that everyone “is equal before the law and has the right to equal protection and benefit of the law”,¹ and that no-one is unfairly discriminated against on the grounds of race, gender, age and disability, for example.

Despite the centrality of equality in the Constitution, inequality persists. Children in particular experience multiple overlapping layers of inequality. Children are dependent on adult care and supervision for their safety and basic well-being. They are also vulnerable to various forms of neglect, exploitation and abuse by adults and older children. Yet they lack the power and resources to challenge these rights violations.

Children bear the brunt of poverty, inequality and violence, and face discrimination on the grounds of their caregivers’ status and beliefs. A review by the South African Human Rights Commission and UNICEF notes persistent racial and gender inequalities: African children are nearly 18 times more likely to grow up in poverty than White children.² Girls and young women are disproportionately disadvantaged by the HIV pandemic and gender-based violence. Also, children in female-headed households are more likely to experience hunger and are less likely to have access to adequate sanitation and water than children in male-headed households.

Despite the myriad forms of inequality which children experience, they are entitled to the equality rights guaranteed in section 9 of the Constitution.ⁱⁱ In order to understand the constitutional commitment to equality for children better, this essay considers the following questions:

- What kind of equality counts?
- How is the right to equality defined in South African law?
- How has the Constitutional Court interpreted children’s equality rights?
- What is the relationship between children’s equality and socio-economic rights?

What kind of equality counts?

Equality is a deeply contested philosophical and political concept and there is debate about which types of equality count in order

to fulfil the right to equality. The key area of debate is the relationship between equality, poverty and a just society. Is a just society one in which no poverty exists, despite high levels of inequality? Or is a just society a broadly equal one in which great disparities between rich and poor do not exist? Most political theorists within the liberal tradition regard equality as a key ingredient of a just society.

However, there are differences in what kinds of inequalities are seen as tolerable. Should we only be concerned about the equal distribution of civil and political rights, or are inequalities in the distribution of social and economic resources in society also of political and legal concern? For example, John Rawls’s first principle of justice is that each person is equally entitled to basic liberties (civil and political rights).³ His second principle of justice concerns the conditions under which social and economic inequalities in a society can be considered just: First, social and economic opportunities must be open to all (equality of opportunity). Second, inequalities in the distribution of goods and services are only justified if the worst-off in society are better off than they would be without those inequalities (the difference principle).⁴

Absolute or relative poverty

A closely related issue is the relationship between poverty and equality, and whether to focus on measures of absolute or relative poverty.

Absolute poverty is concerned primarily with defining the minimum required for each person to survive and meet their basic human needs. For example, one of the Millennium Development Goals aims to halve the proportion of people living on less than one US dollar per day. This notion of a basic threshold is similar to the concept of a minimum core which certain scholars argue should be a priority obligation of the state in the realisation of socio-economic rights.⁵ Although inequality is not unimportant within the absolute poverty perspective, it is seen as a separate and distinctive problem to that of poverty.

Critics of the absolute poverty perspective argue that structural inequality affects the ability of people to meet their basic needs.⁶ Significant social disparities can undermine the ability of people to participate as equals in all spheres of social life, thereby entrenching deep patterns of poverty and social exclusion. As Amartya Sen points out:

ⁱ I am indebted to Tarryn Bannister, LLM candidate in the SERAJ project, for her invaluable research assistance for the purposes of this chapter.

ⁱⁱ The rights in section 9 are guaranteed to “everyone” and would thus extend to children unlike, for example, the right to vote in section 19(3) of the Constitution to which only “adult citizens” are entitled.

*Being relatively poor in a rich country can be a great capability handicap, even when one's absolute income is high in terms of world standards ... [as] more income is needed to buy enough commodities to achieve the same social functioning.*⁷

Sen recognises that poverty is not simply about a lack of income or access to commodities, but about the complex economic, social, political, cultural and psychological barriers which impede people's ability to participate effectively in society. For example, children may have access to the basic necessities of life, but whether they are in fact well-nourished, educated and healthy will depend on the quality of the care, support and guidance of their caregivers. In other words, one cannot ignore the impact of disparate power relationships in determining whether access to resources and social services can be converted into valuable outcomes for adults or children.

Difficulties also arise concerning who defines the basic needs of the poor. Of particular concern is the paternalism inherent in absolute poverty measures, where experts define what the poor need thereby denying them agency and voice in defining their own needs.

However, relative measures of poverty are also problematic. Such measures tend to focus on the gaps between the best and worst-off in society, but can ignore significant inequalities between groups both below and above the poverty line. Even if a society is relatively equal, this doesn't mean it is not afflicted by poverty, as a large section of the population may still not enjoy decent living standards.⁸ In other words, poverty and inequality are closely inter-related, but they cannot be collapsed into a single construct.

Amartya Sen's capabilities theory represents one attempt to combine absolute and relative approaches to poverty. Sen argues that development theorists and policy-makers should look beyond income poverty and focus on expanding people's "... 'capabilities' to lead the kind of lives they value".⁹ Sen defines poverty in absolute terms as "the failure of basic capabilities to reach certain minimally acceptable levels".¹⁰ However, he recognises that the resources needed to achieve minimally acceptable functioning are relative – and vary according to the particular needs and circumstances of the group concerned and the structural features of the particular society in question. For example a child living with disabilities will need more resources and support than an able-bodied child to be able to participate in society.

Equality of status or equality of resources

Case law dealing with the right to non-discrimination tends to focus on inequality of "status", for example, discrimination and disrespect for certain groups on grounds such as race, gender, sexual orientation, religion and belief. It has proven far more difficult for inequalities in the distribution of resources and services to be recognised within the non-discrimination paradigm of equality law.¹¹ This is so, even though poverty is notoriously a source of deep disadvantage and stigma in society.

It is also well-known that many of the traditional groups addressed by non-discrimination law – Black people, women and those living with disabilities – are disproportionately affected by

poverty and the unequal distribution of resources. Where such overlaps can be proven it may be possible to bring a claim based on indirect discrimination on grounds such as race or gender. However, it remains difficult to challenge poverty as a form of discrimination in its own right.¹²

Formal or substantive equality

A further question for consideration is how courts should assess whether the equality norm has been violated and, if so, how should violations be redressed? These questions are also relevant to legislators, policy-makers, institutions such as the South African Human Rights Commission and civil society in formulating, implementing, monitoring and advocating for policies which respect and promote the right to equality and non-discrimination.

There is a key distinction between formal and substantive equality. Formal equality focuses on treating everyone exactly the same regardless of their actual situation or circumstances (equality of opportunity). In some circumstances, this may be justifiable, such as the principle of one person, one vote. However, in many other contexts, identical treatment ignores the very real differences between groups and socially constructed barriers to equal participation. For example, treating a child witness in a court case in the same way as an adult witness does not take into account the differences between children and adults, and children's relative lack of power within an adult-designed and -managed criminal justice system. So a formal approach to equality may simply end up entrenching existing inequalities. The United Nations Committee on Economic, Social and Cultural Rights has noted that:

*Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. State parties must therefore immediately adopt the necessary measures to prevent, diminish or eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.*¹³

Substantive equality aims to achieve equal outcomes for people in real world situations. It is closely attuned to the historical, social, economic and political context of inequality in a particular society, and recognises that sometimes groups must be treated differently in order to compensate for existing inequalities and achieve fair outcomes.¹⁴ A substantive equality approach is also sympathetic to the use of affirmative action measures to redress systemic discrimination. Depending on the context, substantive equality may entail creating equal opportunities for disadvantaged groups ("levelling the playing fields") or redistributive measures in favour of such groups to enable them to achieve equal outcomes.

The legal theorist, Ronald Dworkin, argues that while certain rights may require equal treatment (eg the right to vote), equality in the distribution of goods and opportunities generally requires "the right to equal concern and respect" in political decisions about how these goods and opportunities are to be distributed.¹⁵ This

Box 1: The right to equality and non-discrimination

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Source: Constitution of the Republic of South Africa, 1996. Section 9.

implies that those who will be disadvantaged by a particular policy choice have a right to have their needs and interests taken into account when weighing up the advantages and disadvantages of the policy for society. This is highly relevant to children whose needs and interests are often ignored or minimised by policy-makers, particularly in the case of policies that do not expressly refer to children (eg job creation programmes). There is seldom a serious and systematic audit and consideration of the impact of particular policies on children.

Levelling up or levelling down

A final consideration is deciding on the appropriate remedy if legislation or policy is found to be in breach of the right to equality. One possible approach is to say that it is acceptable for the benefits offered by a particular programme to be levelled up or down, providing that the affected groups are treated the same. In contrast, a substantive approach to equality would seek to achieve a fair distribution of resources, but avoid the result of inadequate services being delivered to everyone ("equality with a vengeance" or "equality of the graveyard"¹⁶).

For example, in the past men qualified for an Old Age Grant at 65, while women qualified at 60. To achieve formal equality (or the equal treatment of men and women), it is possible to either level up the benefits so that men can retire earlier, or level down, so that women wait until 65 before receiving a pension. While a formal

approach to equality would be content with levelling up or down, a substantive approach would be reluctant to deprive women of their existing benefits and more inclined to extend the benefits of early retirement to men. However, a substantive approach to equality would also consider the broader patterns of gender inequality in the work place which could be used to motivate for maintaining the *status quo* as an affirmative action measure.ⁱⁱⁱ

In a number of challenges to legislation that violates the equality clause in the Constitution, the Constitutional Court has preferred to include the excluded, and extend the benefits of the legislation to the excluded group rather than strike down the discriminatory legislation.¹⁷ This outcome is also reinforced by the express inclusion of socio-economic rights in the Bill of Rights which requires the progressive realisation of socio-economic rights.¹⁸ Any reduction in the level or quality of benefits delivered would require justification by the state as these "retrogressive measures" are contrary to the state's constitutional mandate to advance "as expeditiously and effectively as possible" towards the goal of full realisation of the relevant rights for everyone.¹⁹

How is the right to equality defined in South Africa law?

Equality before the law, and equal benefit and protection of the law, are basic guarantees to which everyone is entitled. This means that the state may not make arbitrary, irrational distinctions amongst various groups in society when it makes policy or adopts legislation.

It is significant that section 9(2) of the Constitution defines equality to include "the full and equal enjoyment of all rights and freedoms" (see box 1). This implies that the right to equality extends to the enjoyment of all the rights in the Bill of Rights – civil and political rights, as well as economic, social and cultural rights. The Constitution therefore does not limit the reach of equality rights to only the civil and political sphere. Section 9(2) also expressly mandates restitutionary equality (affirmative action measures) to promote the achievement of equality. It recognises that legislative and other measures to benefit disadvantaged groups are essential to redress the inequalities of the past and achieve substantive equality.^{iv}

Sections 9(3) and 9(4) of the Constitution prohibit direct or indirect unfair discrimination on different grounds. Grounds which are not expressly listed may also be recognised by the courts if they have the potential to affect people adversely or impair their human dignity.²⁰ On this basis, the Constitutional Court has, for example, recognised HIV-positive status²¹ and citizenship²² as potential grounds of prohibited discrimination.

The duty to refrain from unfair discrimination extends beyond the state to "any person". This means that the duty applies, for example, to independent schools, banks, private landlords, social welfare organisations and a wide spectrum of non-state entities.

iii In *Christian Roberts v Minister of Social Development*, case no 32838/05 (2010) TPD, the North Gauteng High Court rejected an application for the Old Age Grant to be equalised at 60 years for men and women. However, the Ministry of Social Development decided, prior to this judgment, to "level up" the age of eligibility for male pensioners to age 60 years, using a phasing-in approach over three years.

iv The criteria for affirmative action measures to comply with section 9(2) of the Constitution were established by the Constitutional Court in *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

How has the Constitutional Court interpreted the rights to equality and non-discrimination?

The Constitutional Court endorses a substantive approach to the interpretation of section 9. In the context of affirmative action it means encouraging carefully crafted measures which can enable disadvantaged groups to participate as equals in all spheres of society. A substantive approach is also used to assess whether discrimination is “unfair”. The Court’s approach is well captured in an extract from Justice Moseneke’s judgment in *Minister of Finance v Van Heerden*:

... a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact. ... This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systemic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but “situation sensitive” approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response[s] in our evolving democratic society.²³

Key factors in determining if a measure discriminates unfairly are:

1. the position of a group in society and whether they have been disadvantaged in the past;
2. the nature and purpose of the discriminating provisions; and
3. the impact of the measure on the human dignity of the group or the extent to which it seriously infringes their rights or interests.²⁴

Constitutional Court rulings have shown that discriminating between groups can sometimes be fair. For example, in one case the Court found that the remission of sentence granted to all mothers who were in prison and who had children younger than 12 years did not constitute unfair gender discrimination as mothers bore a disproportionate burden of child care responsibilities.²⁵ This

was particularly the case given that fathers did not experience the same deep patterns of economic and social disadvantage as mothers. However, the case illustrates the fine line between assisting disadvantaged groups to overcome entrenched patterns of disadvantage, and the danger of entrenching gender roles and other invidious stereotypes.

Some equality cases decided by the Constitutional Court have dealt with discrimination against various forms of relationships such as gay relationships,²⁶ customary law marriages,²⁷ religious marriages,²⁸ and long-term cohabiting partners.²⁹ These cases have implications for children adopted or born to couples in such relationships and may result in children not enjoying the benefit of parental rights and responsibilities to the same extent if their parents’ relationship was recognised.^v The failure to recognise certain relationships may also result in children’s primary caregivers (usually women) being denied resources such as maintenance payments for their children’s basic needs.

Certain common law or customary law rules may discriminate directly against certain categories of children, as illustrated in case 1.

Case 1: Challenging unfair inheritance laws

Mrs Bhe challenged the rule of primogeniture^{vi} to enable her two minor daughters to inherit a house from their deceased father. This rule was also challenged in the public interest on behalf of all female children, younger siblings and extra-marital children. Former Chief Justice Pius Langa confirmed that children “may not be subjected to unfair discrimination”.³⁰ He also pointed out that the primogeniture rule not only discriminated on grounds of sex (against female descendants), but also on the grounds of birth as it undermined the human dignity of extra-marital children by depriving them of their right to inherit from their deceased father.

Source: *Bhe and Others v Khayelitsha Magistrate and Others* 2005 1 SA 580 (CC).

The Promotion of Equality and Prevention of Unfair Discrimination Act³¹ gives effect to section 9(4) of the Constitution, and contains provisions for challenging unfair discrimination before the Equality Courts. It also endorses a substantive approach to equality and requires public and private institutions to take positive steps to address disadvantages and to accommodate diversity. For example, the Constitutional Court held that a public school had failed to reasonably accommodate the sincere religious and cultural beliefs and practices of a Hindu learner who sought to wear a nose stud to school in contravention of the official School Uniform Code.³² The Court found this to constitute unfair discrimination in terms of the Equality Act, and ordered the school to amend its uniform code to make reasonable provision for the religious and cultural beliefs of learners.

v For example: *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) (provisions in the Child Care Act of 1974 limiting adoption rights to married persons and excluding same-sex couples found to be unconstitutional); *J v Director-General, Department of Home Affairs* 2003 (5) SA 621 (CC) (section 5 of the Children’s Status Act of 1987 found to be unconstitutional as it didn’t allow for both parties in a gay relationship from being recognised as parents of children conceived through artificial insemination). The parental rights and responsibilities of unmarried fathers are now regulated by section 21 of the Children’s Act of 2005.

vi The right of the first born son to inherit the estate, where no will (testament) is left.

Legislative and policy measures which discriminate directly or indirectly against children must also consider the constitutional injunction that a child's best interests are of paramount importance in every matter concerning the child.³³ As explained by Justice Sachs, the law should strive to be "child-sensitive." He went on to state that statutes must be interpreted and the common law developed "in a manner which favours protecting and advancing the interests of children; and the courts must function in a manner which at all times shows due respect for children's rights".³⁴ Justice Sachs cited with approval Julia Sloth-Nielsen's view that courts and administrative authorities should be "constitutionally bound to give consideration to the effect their decisions will have on children's lives".³⁵

There is also a strong case for children's capacity and right to participate in matters that affect them, as outlined in the Children's Act.³⁶ The courts have on occasion recognised the importance of hearing children's voices in cases that affect their rights. For example, in a Constitutional Court case on corporal punishment in independent schools, Justice Sachs lamented the fact that a *curator ad litem* (legal representative) had not been appointed to represent the voices and interests of the affected children:

*A curator could have made sensitive enquiries so as to enable their [the learners at the relevant schools] voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.*³⁷

What is the relationship between children's socio-economic and equality rights?

There is an important overlap in the Constitution between the right to equality and socio-economic rights in the Bill of Rights. Children share the same range of socio-economic rights as adults including the right to have access to housing, health care, food, water, social security and education. Children are also entitled to additional protection which includes the "right to basic nutrition, shelter, basic health care services and social services"³⁸ (illustrated in figure 1 on p. 29).

In the *Grootboom* case, the Constitutional Court held that parents and families have the primary duty to fulfil children's socio-economic rights, while the state is only directly responsible for fulfilling these rights for children who are without family care.³⁹ The Court held that the state has a duty to create a legal and administrative infrastructure to give children living with parents or families the protection outlined in section 28.⁴⁰

In addition, the state is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of everyone's rights to housing, health care, food, water and social security.

In the case of the *Minister of Health and Others v Treatment Action Campaign and Others* the Court judgment went a step further and

implied that the state should take reasonable measures to assist parents to care for their children, and to ensure that they have access to critical social services, such as health care, when parents are too poor to provide access from their own resources.⁴¹

The Constitutional Court has held that the constitutional right to basic education⁴² imposes a direct and immediate obligation on the state.⁴³ This right may only be limited if it is considered "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" in line with the general limitations clause in the Constitution.⁴⁴

The overlap between these socio-economic rights provisions and the right to equality arises when groups are excluded unfairly from socio-economic programmes, or when services are delivered in ways which reinforce stereotypes and undermine the dignity of the recipients.⁴⁵ The *Khosa* case illustrates how it is possible to challenge policies on the grounds that they violate both socio-economic and equality rights (see case 2).

Case 2: Equal access to social grants for permanent residents

The case involved a challenge to certain provisions of the Social Assistance Act⁴⁶ and the Welfare Laws Amendment Act⁴⁷ which limited social grants to South African citizens. The applicants were Mozambican citizens who had lived in South Africa since 1980, and who had permanent residence status. They were destitute and needed access to social grants.

The applicants argued that limiting these grants to citizens, and excluding permanent residents, constituted unfair discrimination, and violated the right of "everyone" to have access to "appropriate social assistance".⁴⁸ The Court ruled that both constitutional provisions were violated and that the legislation should be amended to include permanent residents as a group eligible for social grants.

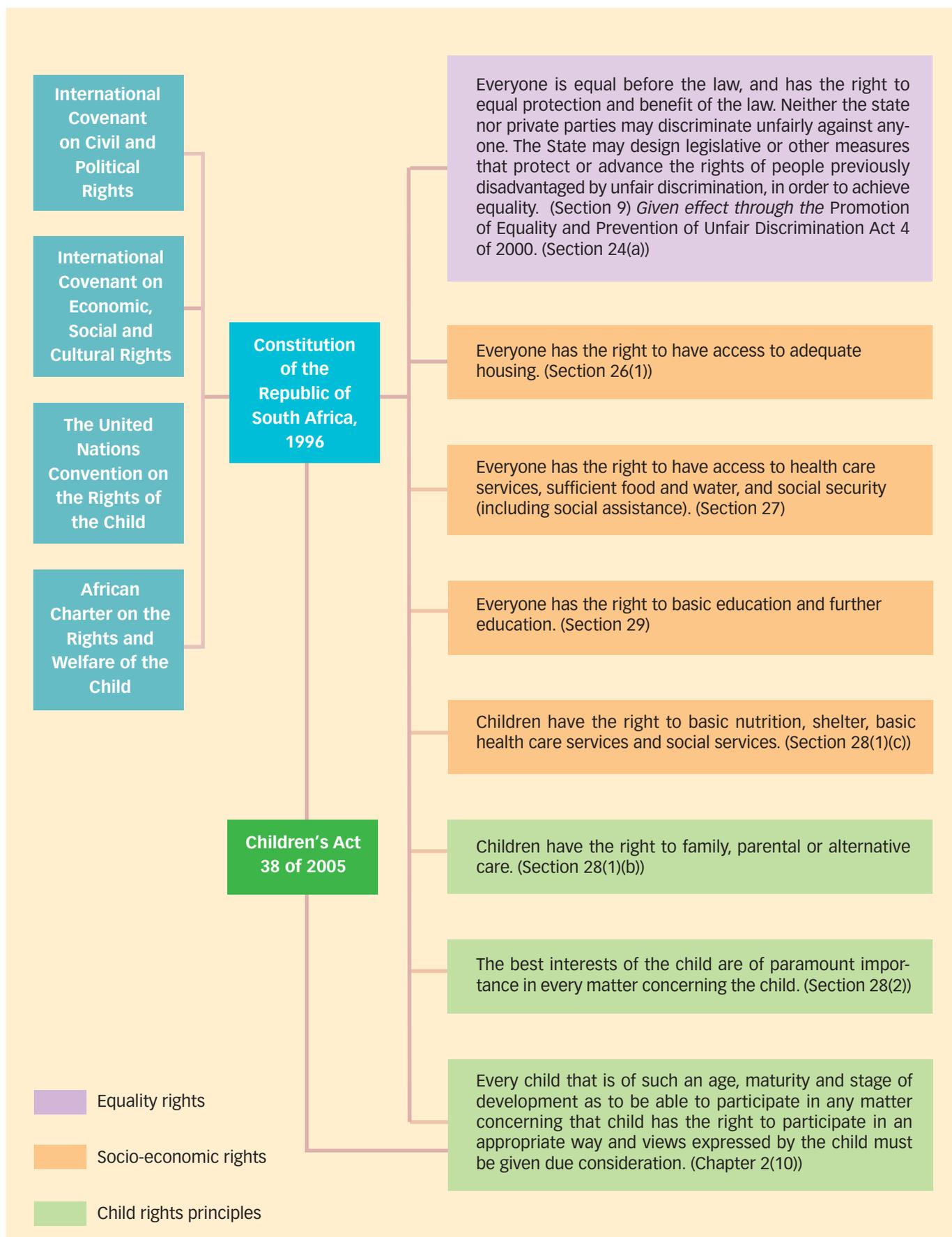
Source: *Khosa & Others v Minister of Social Development & Others* 2004(6) BCLR 569 (CC).

Case 3 on p. 30 explains another significant High Court judgment, which dealt with the overlap between unfair discrimination and socio-economic rights focusing on disability and the right to a basic education.

Litigants may face difficult strategic questions on whether to frame a case as a violation of their equality or socio-economic rights, or a combination of the two (as in the *Khosa* and *Western Cape Forum for Intellectual Disabilities* cases). The equality rights paradigm is often more responsive to claims involving exclusion of a particular group on the basis of their status such as race, gender, religion, etc.⁵⁰

Legislators and courts (in South Africa and internationally) are less likely to recognise and design remedies which respond effectively to poverty as a prohibited ground of discrimination in its own right. However, the Promotion of Equality and Prevention of Unfair

Figure 1: Children’s equality and socio-economic rights in South African law



Case 3: Equal access to education for children with intellectual disabilities

The case challenged policies of both the national and Western Cape provincial governments which had the effect of excluding children with severe or profound intellectual disabilities from schooling. It also challenged inadequate budgetary provision for the education of such children through Department of Health subsidies to over-subscribed non-governmental organisations such as the Western Cape Forum for Intellectual Disability.

The Court held that the policy failed the section 9 test in that government could not demonstrate that the policy was rational. In particular, the government had not explained why any budgetary shortfall in the provision of education should be borne exclusively by the most vulnerable group of children instead of being shared by all. In this regard, the Court drew on

the principles established in its socio-economic rights jurisprudence in the *Grootboom* case that the socio-economic needs of those who are especially vulnerable cannot be ignored in government policy and programmes.

The Court also held that the right of children with severe or profound intellectual disabilities to a basic education were being infringed by the relevant policies. They were not eligible for admission to special schools and inadequate budgetary provision was made for special care centres run by the Western Cape Forum for Intellectual Disability. This meant that many children with severe or profound intellectual disabilities would not have access to an appropriately tailored basic education programme.⁴⁹

Source: *Western Cape Forum for Intellectual Disability v Government of South Africa* (2011) 5 SA 87 (WCC).

Discrimination Act does include a directive principle on HIV/AIDS, nationality, socio-economic status and family responsibility and status as potential grounds of prohibited discrimination under the legislation.⁵¹ These grounds are yet to be formally included in the list of prohibited grounds under the Act. However, a court may still find that they are included within one of the listed grounds of discrimination, or fall within the open-ended category of grounds which cause or perpetuate systemic disadvantage, undermine human dignity, or seriously undermine the equal enjoyment of a person's rights and freedoms.⁵² These provisions carry much untapped potential to advocate for effective policy and judicial remedies for children experiencing various forms of systemic disadvantage and socio-economic marginalisation.

Given that the Constitution entrenches both equality rights and socio-economic rights, there is great scope for developing a creative synergy between these two sets of rights. Policy-makers and children's rights advocates can build on this rights framework to address the limitations of current policies and programmes and develop more effective responses to the mutually reinforcing patterns of disadvantage created by both discrimination and socio-economic deprivation.

What are the conclusions?

There are many complex questions when considering the position of children within an equality rights paradigm, but there are also very important insights to be gained in doing so. In particular, an equality and non-discrimination perspective helps illuminate the disparate impact of poverty on various categories of children.

It also highlights how the design or implementation of social programmes can fail to take into account the specific needs and circumstances of children, and in the process increase their vulnerability and disadvantage. When designing programmes and policy responses to poverty, it is particularly important that the "best interests of the child" are considered.

Children are embedded in communities and family relationships and specific measures supporting communities and families to care for children adequately are indispensable, as required by the United Nations Convention on the Rights of the Child and the African Children's Charter.⁵³

While law and policy should aim to promote the full and equal enjoyment of all rights, this may require differences in treatment, including adopting special measures in favour of disadvantaged groups of children and their caregivers. Achieving substantive equality requires a move beyond a "one-size-fits-all" approach. Policy-makers and programme managers need to analyse the differences between children and take account of factors such as their age, race, gender, location, caregivers' relationship status and income in policy and programme design.

A substantive equality right combined with the express inclusion of socio-economic rights in the Bill of Rights provides an optimal normative framework for the development of the capabilities of all children. Paying attention to children's equality rights can provide significant insights into the types of interventions that will assist them to participate as equals in South Africa's young democracy.

References

- 1 Constitution of South Africa, 1996. Section 9.
- 2 UNICEF & South African Human Rights Commission (2011) *South Africa's Children – A Review of Equity and Child Rights*. Pretoria: UNICEF & SAHRC.
- 3 Rawls J (2001) *Justice as Fairness: A Restatement*. Cambridge, Massachusetts: Belknap Press.
- 4 See no. 3 above.
- 5 See for example: Bilchitz D (2007) *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*. Oxford: Oxford University Press.
- 6 Fredman S (2012) The potential and limits of an equal rights paradigm in addressing poverty. In: Liebenberg S & Quinot G (eds) *Law and Poverty: Perspectives from South Africa and Beyond*. Cape Town: Juta.
- 7 Sen A (1999) *Development as Freedom*. Oxford: Oxford University Press: 89.
- 8 See the discussion by Fredman (no. 6 above): 571 – 572.
- 9 See no. 7 above: 18; Nussbaum MC (2000) *Women and Human Development – The Capabilities Approach* (2000). Cambridge, UK: Cambridge University Press.
- 10 Sen A (1995) *Inequality Reexamined*. Oxford: Oxford University Press: 109.
- 11 For a philosophical account and critique of the recognition and redistribution models of social justice, see: Fraser N (2003) Social justice in the age of identity politics: Redistribution, recognition and participation. In: Fraser N & Honneth A

- (2003) *Redistribution or Recognition? A Political-Philosophical Exchange*. London & New York City: Verso.
- 12 See no. 6 above.
 - 13 UN Committee on Economic, Social and Cultural Rights (2009) *General Comment No. 20. Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*. UN doc. E/C 12/GC/20, 2 July 2009: para 8.
 - 14 For an excellent account of the demands of substantive equality in the South African context, see: Albertyn C (2003) Substantive equality and transformation in South Africa (2007) *South African Journal on Human Rights*. Substantive Equality: Special Issue 2, (23): 253-276.
 - 15 Dworkin R (1978) *Taking Rights Seriously*. Cambridge, MA: Harvard University Press: 273.
 - 16 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC): paras 75-77 (per Ackermann J).
 - 17 See for example no. 16 above;
Khosa & Others v Minister of Social Development & Others 2004(6) BCLR 569 (CC);
Mahlaule & Others v Minister of Social Development & Others 2004 (6) SA 505 (CC).
 - 18 Sections 26(1) and 26(2) and 27(1) and 27(2).
 - 19 UN Committee on Economic, Social and Cultural Rights (1990) *General Comment No. 3. The Nature of States Parties' Obligations (art 2(1) of the Covenant)*. UN doc. E/1991/23: para 9;
See also the endorsement of this reading by the Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC): para 45.
 - 20 *Harksen v Lane NO* 1998(1) SA 300 (CC).
 - 21 *Hoffman v South African Airways* 2000 (11) BCLR 1235 (CC).
 - 22 See no. 17 above (*Khosa & Others; Mahlaule & Others*).
 - 23 *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC): paras 26-27. [footnotes omitted]
 - 24 See no. 20 above: para 52.
 - 25 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).
 - 26 *Minister of Home Affairs and Another v Fourie and Another* 2003 (5) SA 301 (CC);
Lesbian and Gay Equality Project v Minister of Home Affairs 2006 (1) SA 524 (CC).
The Civil Union Act 17 of 2006 was enacted to give effect to this judgment.
 - 27 *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).
 - 28 *Daniels v Campbell NO* 2004 (5) SA 331 (CC);
Hassan v Jacobs NO 2009 (5) SA 572 (CC).
 - 29 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).
 - 30 *Bhe and Others v Khayelitsha Magistrate and Others* 2005 1 SA 580 (CC): para 52.
 - 31 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
 - 32 *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).
 - 33 Section 28(2).
 - 34 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC): para 15.
 - 35 Sloth-Nielsen J (1996) Chicken soup or chainsaws: Some implications of the constitutionalisation of children's rights in South Africa. *Acta Juridica* 6: 25.
 - 36 Jamieson L, Bray R, Viviers A, Lake L, Pendlebury S & Smith C (2011) *South African Child Gauge 2010/2011*. Cape Town: Children's Institute, UCT.
 - 37 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC): para 53.
See also Nolan A (2011) *Children's Socio-Economic Rights, Democracy and the Courts*. Oxford: Hart Publishing.
 - 38 Section 28(1)(c). For an analysis of the jurisprudence on children's socio-economic rights, see: Liebenberg S (2010) *Socio-Economic Rights: Adjudication under a Transformative Constitution*. Cape Town: Juta; and Proudlock P (2009) Children's socio-economic rights. In: Boezaart T (ed) *Child Law in South Africa*. Cape Town: Juta.
 - 39 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
 - 40 See no. 39 above.
 - 41 *Minister of Health v Treatment Action Campaign (No. 2)* 2002 (5) SA 721: paras 74-78.
 - 42 Section 29(1)(a).
 - 43 *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC): para 37.
 - 44 Section 36.
 - 45 Liebenberg S & Goldblatt B (2007) The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution. *South African Journal of Human Rights*, 23: 335.
 - 46 Social Assistance Act 59 of 1992.
 - 47 Welfare Laws Amendment Act 106 of 1997.
 - 48 Section 27(1)(c) read with section 27(2).
 - 49 Ngwena C & L Pretorius (2012) Substantive equality for disabled learners in state provision of basic education: A commentary on Western Cape Forum for Intellectual Disability v Government of South Africa. *South African Journal of Human Rights*, 28: 81-115.
 - 50 See no. 6 above.
 - 51 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 34.
 - 52 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 34(2) read with 1(xxii)(b).
 - 53 Office of the High Commissioner of Human Rights (1989) *Convention on the Rights of the Child, UN General Assembly resolution 44/25*. Geneva: United Nations, Article 27;
Secretary General of the African Union (1990) *African Charter on the Rights and Welfare of the Child*. OAU resolution 21.8/49 Addis Ababa: OAU, Article 20.