

Budgetary Obligations under the Convention on the Rights of the Child– Recommendations to Scotland as it moves towards the incorporation of the UNCRC into Scots law

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Abstract: *This report explores the impact that the incorporation of the UNCRC into Scots law may have in relation to UNCRC Article 4. The study focuses specifically on the second part of the Article which entails the State parties' obligation to use its Maximum Available Resources to respect, protect and fulfil children's social, economic and cultural rights. Additionally, it draws from the Committee on the Rights of the Child's General Comment 19 to identify the relevant themes and concepts that should be used for the realisation of these rights. The main concepts are, the progressive realisation of rights, the principle of non-regression and the AAAQ framework. Furthermore, it includes a comparative study on the interpretation of UNCRC budgetary obligations in South Africa and Sweden by analysing cases from each jurisdiction. The study draws from learning from each jurisdiction, alongside jurisprudence from the Committee, to direct recommendations at the Scottish executive, legislature and judiciary on how to maximise the impact of UNCRC incorporation to progress the realisation of children's social and economic rights.*

Key words: *children's rights; budgeting; AAAQ Framework; social and economic rights; maximum available resources*



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List of Abbreviations

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| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CERD | Convention on the Elimination of All Forms of Racial Discrimination |
| CRC | The Committee on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| ECHR | European Convention on Human Rights |
| ESC | Economic, Social and Cultural |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| UNCRC | Convention on the Rights of the Child |

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1. Introduction

By 2021, the Scottish Government has committed to incorporating the Convention on the Rights of the Child (UNCRC) into Scots law. Incorporation of the UNCRC has been analysed thoroughly by scholars from a children's rights perspective, yet little research has been conducted that focuses specifically on the implications it has on the application of UNCRC Article 4. Hence, this report will analyse what obligations, with regard to children's rights, Article 4 places on the Scottish Government, Parliament and judiciary in relation to setting, monitoring and scrutinising the budgetary process. This study will specifically concentrate on the second part the Article which is "[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation".¹ Thus, this report will concentrate on how Article 4 could be respected, protected and fulfilled in Scotland by all arms of State – executive, legislature and judiciary. This report will conduct a comparative study on the application of Article 4 and wider incorporation of the UNCRC and children's social and economic rights in South Africa and Sweden. The comparative study will highlight learning and approaches in these jurisdictions, allowing a series of recommendations to be made to Scotland that could be taken forward to ensure legislation, policy and practice is compatible with the UNCRC once it is incorporated into Scots law.

1.1. Budgetary obligations in relation to children's social and economic rights

Children's social and economic rights can be found in several human rights treaties, with the most prominent being the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the UNCRC.² The European Convention on Human Rights (ECHR) primarily consists of civil and political rights with a limited amount of social and economic rights.³ Article 4 of the UNCRC imposes specific measurable obligations on States Parties to respect, protect and fulfil children's rights by requiring that the "States Parties shall undertake such measures to the maximum extent of their available resources".⁴ There are other Conventions with articles that are similar or almost identical to Article 4, with the most relevant being Article

¹ Convention on the Rights of the Child [Hereinafter UNCRC], 20 November 1989, 1577 UNTS 3, Article 4

² There are several misconceptions surrounding social and economic rights which have already been addressed in depth by scholars such as Aoife Nolan, thereby a detailed study is out with the scope of this report. This report main focus is Article 4 of the UNCRC.

³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

⁴ UNCRC, Article 4

2 (1) of ICESCR.⁵⁶ The recommendations of this report should enable all arms the of the State across Scotland - legislature, judiciary and executive – to approach implementation and scrutiny of budgetary decision-making in a way that promotes and fulfils their UNCRC obligations. It is common practice for any democratic government to include a human rights assessment during its budget process.⁷ It is less common for governments to do the same for children’s rights.⁸ When a State executes its budget, the realisation of children’s rights must always be a primary consideration which should be prioritised in resource allocation. Despite the fact that resource allocation is almost always a political decision, the State should, at all times, take into consideration its obligations relating to children’s rights.⁹ That is, it should assess that programs and other processes are managed effectively and are achieving their set aims. If the resources are not used in the manner set out in the budget, the State must guarantee that there are systems in place which ensure that the resources are used effectively and efficiently. A lack of rights-based budgeting deprives children of the right to have access to services needed for the realisation of their rights. If children’s rights are not fulfilled due to ineffective resource allocation, effective remedies should be put in place to address any breaches of the realisation of children’s rights in public funds and budgets.¹⁰

1.2. Legal framework

1.2.1. Maximum available resources

Resources are required for the State to respect, protect, and fulfil human rights. Children’s social and economic rights are often resource dependent. Once the UNCRC is incorporated into Scots law, the obligations of Article 4 become legally binding on all levels of government. Thus the Scottish Government must undertake steps to fulfil social and economic rights to the ‘maximum of its available resources’ (‘MAR’). These include ensuring that all legislation, policy and practice relating to social and economic rights are applied without discrimination and guaranteeing that in times of economic constraint clear measures exist to ensure the protection of the most vulnerable. The obligation to facilitate and promote these rights must

⁵ International Covenant for Economic, Social and Cultural Rights [Hereinafter ICESCR], 16 December 1966, art 2 (1)

⁶ See also Article 3 of CEDAW, Article 2 (2) CERD, and Article 4(2) CRPD.

⁷ See Scottish Government, Budget 2020/21, February 2020 SG/2020/20

⁸ UNICEF, Reforming child law in South Africa: budgeting and implementation planning (UNICEF 2007), p 10

⁹ Especially the guiding principles of the UNCRC which are the principles of non-discrimination, the best interest of children, child survival and development and child participation.

¹⁰ see High Commissioner for Human Rights, *Towards better investment in the rights of the child*, 19 December 2014

frequently be assessed to ensure that the State progressively develops rights provision which corresponds with its obligation to effectively use its MAR.¹¹ The most effective way to ensure progressive realisation is for the State to increase its 'fiscal space'. Fiscal space can be defined as the space in a government's budget which allows for flexibility in providing resources for a priority area, it is the result of detailed policy actions that strive to improve resource mobilisation.¹² Thus, the argument that social protection is unaffordable in the context of delivering the minimum core Economic, Social and Cultural (ESC) rights, as argued in a South African case discussed later, is a losing argument. Elson et al. (2013) explain that the principle of MAR "implies that the role of the State is not only as an efficient administrator of existing resources, but as an institution that mobilises additional resources" such as "human; technological; organisational; natural and information resources—not only in the public sector but also through its impact on the activities of business and households."¹³ When analysing a government's public funding, it is relevant to examine the distribution of public expenditure between different uses. This could involve comparing the allocation of resources for programmes that support the realisation of human rights with allocations to sectors that do not - such as military spending. State expenditure in support of social and economic rights is not limited to the public and social sector alone as it also involves investment in economic sectors. Thus, the State has a duty to regulate and audit the private provision of these services to ensure that children's rights obligations are met.¹⁴ There are several questions to be asked when a government chooses to contract out services to the private sector, the most relevant being "what are the implications of these changes for social and economic rights?" That is, efficiency and effectiveness is desirable in public spending but any risk of retrogression in the enjoyment of social and economic rights must be avoided and the rights of the affected groups must be safeguarded.¹⁵

1.2.2. Progressive realisation and non-regression

The obligation under Article 4 can be understood as an obligation to the progressive realisation of children's rights. That is, it imposes immediate minimum core obligations from

¹¹ General Comment 19, paragraph 47

¹² I Ortiz, M Cummins and K Karunantny, "Fiscal Space for Social Protection and the SDGs: Options to Expand Social Investments in 187 Countries", *ESS Working Paper No. 048* (ILO, UNICEF UNWOMEN 2017) p, 1

¹³ D Elson, R Balakrishnan, and J Heintz. "Public Finance, Maximum Available Resources and Human Rights." *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*. Ed. Aoife Nolan, Rory O'Connell and Colin Harvey. (London: Hart Publishing, 2013.) pp. 13–40. P, 14

¹⁴ *Ibid.*, p 23

¹⁵ *Ibid.*, p 24-26

which States develop and maximise protections by taking appropriate measures and move as expeditiously and effectively as possible towards the realisation of children's rights. It is important to note, that the obligation to progressively realise rights is of immediate effect.¹⁶ The government should be able to identify the components of its budget that are connected directly and indirectly to the breaches of each social and economic right.¹⁷ Once allocated for these rights, funds should be fully expended to that end and not diverted to fill other gaps of the State's budget.¹⁸ In essence, government revenues (including taxation), public expenditure, public goods and private goods must all be mobilised to ensure MAR are employed to progressively realise social and economic rights. The progressive realisation does not allow States to delay the realisation of children's rights but rather allows States to thoroughly plan and set goals for the steps needed to meet the obligations of the UNCRC.¹⁹ Although Article 4 recognises the need for progressive realisation of children's rights, the UNCRC also imposes various immediate obligations such as guaranteeing that the realisation of children's rights are exercised without discrimination,²⁰ but also, as seen in the Swedish and South African case law below, the immediate realisation of the right to education,²¹ and housing.²² Additionally, children's civil and political rights as well as the progressive realisation to the MAR of children's social and economic rights entail an immediate obligation.²³

As abovementioned, the allocation of resources should not be mismanaged and result in regressive measures affecting the realisation of children's rights. Any deliberately regressive measures would require the most careful consideration and would need to be fully justified to the totality of the rights.²⁴ In the context of full use of MAR, the CRC has clarified that:

¹⁶ Economic and Social Council, Report of the United Nations High Commissioner for Human Rights, E/2007/82 (2007), paragraph 17

¹⁷ Committee on Rights of the Child, General Comment no 5, General measures of implementation of the Convention on the Right of the Child (arts. 4, 42 and 44, para. 6) (2003), paragraph 51

¹⁸ D Elson, R Balakrishnan and J Heintz, 'Public Finance, maximum Available Resources and Human Rights' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance Budgets and the Promotion of Economic and Social Rights* (Hart 2013), p. 16.

¹⁹ Committee on Economic, Social and Cultural Rights, *General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)* Fifth session 14 December 1990, paragraph 2

²⁰ Economic and Social Council, Report of the United Nations High Commissioner for Human Rights, E/2007/82 (2007), paragraph 15

²¹ UNCRC Article 28

²² UNCRC Article 27

²³ General Comment no 19, paragraph 25

²⁴ R Hodgkin, & P Newell, *Implementation Handbook for The Convention of The Rights of The Child*, (UNICEF 2007), p 52

“Article 44 of the Convention obliges States parties to regularly report on their progress in advancing the rights of children in their jurisdictions. Clear and consistent qualitative and quantitative goals and indicators should be used to illustrate the progressive realization of children’s economic, social and cultural rights to the maximum extent of available resources, as well as the realization of the immediate obligations imposed by those rights”²⁵

This means that a State should never go backwards in their realisation and protection of rights unless something really terrible and unavoidable happens such as a global pandemic or in times of an economic crisis - even then the State must prove that the measures taken are necessary, justifiable, proportionate, non-discriminatory and temporary. The State must ensure that the rights affected by the regressive measures will be restored as soon as possible.²⁶ The obligation on governments to avoid regressive measures implies that there should be no unjustified reduction in public expenditure devoted to implementing children’s social and economic rights in the absence of acceptable compensatory measures intended to protect those who might be affected by the cuts. If the government introduces regressive measures on funds in social and economic areas - such as education or health - the decision must be based on careful consideration and must be justified by assuring that the MAR have been used to avoid this decision.²⁷ Furthermore, children’s rights such as the right to non-discrimination, and right to housing, impose immediate and minimum core obligations which cannot be limited by regressive measures.²⁸ The obligation of non-regression requires recognition on the part of the government that cutting allocation generally diminishes some people’s enjoyment of their rights.²⁹ Furthermore, General Comment no 19 affirms that, “[s]tates parties are expected to regularly review and improve their measures to ensure the availability and maximization of resources for the rights of all children.”³⁰ That is, a State party should not settle for the minimum requirement to the realisation of children’s rights but strive to further develop and improve children’s rights beyond the minimum core found in the UNCRC.

²⁵ Committee on the Rights of the Child, General Comment no 19. *On public budgeting for the realization of children's right (Article 4)* (2016) Paragraph 32

²⁶ *Ibid.*, paragraph 31

²⁷ CESCR, General Comment No 3, paragraph 10

²⁸ General Comment 19 paragraph 31

²⁹ Office of the High Commissioner, *Realizing Human Rights through Government Budgets*, p 98-99

³⁰ General Comment no 19, paragraph 32

1.2.3. AAAQ framework

One practical tool through which the obligations of social and economic rights can be assured is the AAAQ framework. This framework is a translation of the general provisions of the international human rights instruments for the realisation of ESC rights, in line with the interpretation of rights as affirmed in the General Comments for ICESCR.³¹ The framework contains four independent criteria: Availability, Accessibility, Acceptability, and Quality.

- 1) The *Availability* criterion require that facilities, goods and services ought to be available in sufficient, quantity and continuous supply.
- 2) The *Accessibility* criterion is elaborate and an inquiry of this criterion should ideally include a high level of participation of rights holders to identify relevant signs for each sub-category. To help identify the barriers to ensure children’s social and economic rights, accessibility can be divided into four sub-criteria which are:
 - a. Physical accessibility
 - b. Economic accessibility or affordability
 - c. Non-discrimination
 - d. Information accessibility
- 3) The *Acceptability* criterion goes hand in hand with the principle of non-discrimination as it requires that facilities, goods, and services be culturally appropriate and respectful of minorities’ and communities’ cultures and their perception of a right
- 4) Lastly, the *Quality* criterion stresses that facilities, goods, and services must be of good quality.³² The government should provide quality goods and services for the lowest cost possible. If the State pays more than it needs to or buys inferior quality goods then the government is failing to meet its MAR obligations.³³

2. Comparative study on the incorporation of the UNCRC

This report will further analyse budgetary obligations resulting from the direct and indirect incorporation of the UNCRC into the binding law of South Africa and Sweden. The comparative study on social and economic rights is founded on caselaw from each jurisdiction

³¹ See Committee on the Rights of the Child, General Comment 4, 12, 13, 14 and 15

³² See, M Villumsen & M Holst Jensen, *AAAQ and The Right to Water- Contextualizing Availability, Accessibility, Accessibility and Quality*, (The Danish institute for Human Rights: Copenhagen 2014)p17-19 and The Danish Institute for Human Rights, “The AAAQ Toolbox: Developing Indicators on the Right to Health”, PowerPoint from UN Social Forum 18-20 February 2015

³³ Office of the High Commissioner, *Realizing Human Rights through Government Budgets*, p 129

as well as official reports and academic literature. The reason for choosing these jurisdictions is their universally acknowledged work for the realisation of children's rights. The two jurisdictions have taken different approaches to the incorporation of children's rights. Sweden just recently made a decision to directly incorporate the UNCRC with effect from 1st January 2020. However, the cases in this analysis predate this change. Accordingly, the cases were decided at a time when Sweden had only *indirectly* incorporated the UNCRC and, as such, children's rights were not yet legally binding despite a commitment to make them so in future. By contrast, South Africa has *directly* incorporated children's rights into its constitution. This comparative section will analyse the outcome of each approach. The cases which will be used do not explicitly refer to Article 4, regardless, the cases engage with the abovementioned concepts which are all relevant to the implementation of Article 4. Moreover, the cases refer to the broader related human rights framework through which the extent of the State's obligations for social and economic rights are set. The majority of the cases found focused on the allocation of resources and falls under the right to education,³⁴ the right to housing, the right to a standard of living,³⁵ the right to social security,³⁶ and the right to health.³⁷ Most cases mention the child's best interest as the primary violation and most important principle thereby directly referring to the core principle of the UNCRC.³⁸ As will be presented in this comparative study, incorporation gives courts a chance to find law incompatible and ask the legislature to amend it – although this depends on how the UNCRC is incorporated and what options exist for the right to remedy:³⁹

“Constitutionalisation has a specific budgetary advantage in that it provides the government with political justification for social programmes and resource allocation that prioritizes children's rights.”⁴⁰

The UNCRC does not specifically mention constitutional incorporation but rather the broader idea of adoption of “legislative” measures. The constitutionalisation of children's rights requires that the State provides a way to enforce those rights and the rights must be

³⁴ UNCRC Article 28

³⁵ UNCRC Article 27

³⁶ UNCRC Article 26

³⁷ UNCRC Article 24

³⁸ UNCRC Article 3

³⁹ UNICEF, *Reforming child law in South Africa: Budgeting and Implementation planning*, 2007, p 3

⁴⁰ *Ibid.*, p 4

justiciable, that is, those who are deprived of these rights by the State have the opportunity to approach courts for remedy.⁴¹ Here the Swedish and South African jurisdictions take two different approaches. The South African constitution contains a specific section dedicated to the rights and principles of the UNCRC,⁴² whilst the Swedish constitution only contains a short paragraph which affirms the unenforceable aims and goals with regard to the governance of the rights of children in the Swedish society. Instead of the constitutionalisation of children's rights, the Swedish jurisdiction has in-directly incorporated the rights of the UNCRC into its domestic law such as the Education Act and the Social Security Act. This comparative study will analyse how these two different methods for the realisation of children's rights affect the outcome for children's social and economic rights in the courts. Moreover, this comparative study will demonstrate what learning can be gained from each jurisdiction which can be used to anticipate how decisions in relation to budgetary obligations and children's social and economic rights might be made post incorporation in Scotland

2.1. Sweden

The Swedish constitution contains four different sections each representing four fundamental laws:

“the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.”⁴³

Unlike the South African constitution, the Swedish constitution does not have a specific section for children rights. Instead the Swedish constitution has a non-enforceable provision found under chapter 1 (2)(4), for the State's general aims and goals for the governing of children (and adults) in the Swedish society.⁴⁴ ⁴⁵ This first chapter has some clear limitations when it comes to protecting the rights of children in general. The first section of the chapter is not a 'hard core' regulation. Instead, it sets out certain goals, making the section vague

⁴¹ General Comment no. 5, paragraph 24-25 and General Comment no. 19, paragraph 21

⁴² See Section 28 of the bill of rights

⁴³ *The Constitution of Sweden –The Fundamental Laws and the Riksdag Act*, Sveriges Riksdag 2016

⁴⁴ J Schiratzki, "Children's Right to Family Life and the Swedish Constitution" in Trude Haugli, Anna Nylund, Randi Sigurdson, Lena R.L. Bendiksen (eds) *Children's Constitutional Rights in the Nordic Countries*, Leiden ; Boston : Brill, 2020, pp. 357-373, p 357

⁴⁵ In 2011, the instrument of government was amended to include this specific provision for children. According to chapter 1 (2)(4) "[t]he public institutions shall promote the opportunity for all to attain participation and equality in society and for the rights of the child to be safeguarded."

and non-enforceable. As a consequence, the provision has no grounds for any complaint procedure if children's rights are violated.⁴⁶ Instead, chapter 2 features enforceable fundamental rights which apply regardless of age, thus children and adults are seen as having the same fundamental rights and freedoms.⁴⁷ This disregards the principle established in the preamble of the UNCRC that:

“the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. That is, children do not possess the same legal capacity and are dependent on adults on almost all issues regarding their rights and living conditions.”⁴⁸

Some rights such as the right to education, already exist under the constitution and in domestic law which is why Sweden up until 2020 chose not to directly incorporate the UNCRC. The principle of the best interests of the child as well as the right to participation are legally binding in many laws regulating children's social and economic rights.⁴⁹ The decision to directly incorporate the UNCRC in 2020 ended years of discussion about the legal status of children's rights in Sweden. The new legislation, which entered into force on January 1st 2020, is a direct translation of the UNCRC which can be used in any cases involving children's rights to grant further legal support.⁵⁰ Due to its previous indirect incorporation and its application of UNCRC rights as guiding principles in its constitution, the Swedish jurisdiction and case law provides a useful contrast to South Africa's where children's rights are binding constitutional law.

2.1.1. Right to education

The child's right to free basic education can be found under chapter 2 (18) of the Swedish constitution,⁵¹ this right can also be found in the Education Act.⁵² The constitution states that,

⁴⁶ T Mattsson, “Constitutional Rights for Children in Sweden”, in Trude Haugli, Anna Nylund, Randi Sigurdson, Lena R.L. Bendiksen (eds) *Children's Constitutional Rights in the Nordic Countries*, Leiden ; Boston : Brill, 2020, pp 103-119, p 110

⁴⁷ Ibid., p 111

⁴⁸ UNCRC Preamble

⁴⁹ See Socialtjänstlag [Social Services Act] (2001:453) Chapter 1 Section 2 and 11, see also Skollagen [Education Act] (2010:800) Chapter 1 Section 10

⁵⁰ “Barnkonventionen som Svensk lag” [The Convention on the rights of the child as Swedish law] (translated by author), Regeringskansliet, available at <https://www.regeringen.se/regeringens-politik/barnkonventionen-som-svensk-lag/> [accessed 23 July 2020]

⁵¹ Kungörelse (1974:152) om beslutad ny regeringsform [Swedish Constitution], chapter 2 Section 18

⁵² Skollagen [Education Act] (2010:800) chapter 7 Section 3

“All children covered by compulsory schooling shall be entitled to a free basic education in the public education system.”⁵³ Section 18 of the Swedish constitution reaffirms the immediate right to free basic education,⁵⁴ but does not include all of the obligations found under Articles 28 and 29 of the UNCRC. Nevertheless, most of the other obligations can be found in other parts of Swedish domestic law.⁵⁵ This means that the Swedish jurisdiction did, even before the direct incorporation, fulfil its legislative obligations for the right to education set out in the UNCRC. Regardless, this does not ensure that the obligation has been fulfilled in practice. Two cases, one from 2013,⁵⁶ and one from 2014,⁵⁷ concerned the right to free school transport, where only the last case directly mentioned the right to education under the constitution and the Education Act.⁵⁸ In the two cases, the children involved attended schools outside their residential municipality which created issues regarding where the obligation of funding free school transport lay.⁵⁹ In the first case from 2013, the residential municipality argued that it had no obligation to supply funding for school transport outside of its borders. The child had chosen to attend a school in another municipality and therefore the child’s family should cover the commute expenses. The municipality further argued, in relation to MAR, that the extensive funding required for the child would be beyond their available resources, the court ruled in favour of the municipality.⁶⁰ The court failed to mention that the municipality’s lack of sufficient resources allocated towards school transport created barriers for the child’s availability and accessibility of the right to free school transport thereby threatening the principle of non-regression. That is, the lack of economic accessibility threatened the realisation of the child’s right to education. By failing to mention the right to education in the process of the case, the court’s outcome did not fulfil the criteria of the AAAQ framework. In the other case from 2014, the child did not choose to attend a school outside of the residential municipality as the parents divorced and moved to different municipalities whilst sharing custody.⁶¹ According to a ruling by the Supreme Court,⁶² a municipality can be

⁵³ Kungörelse (1974:152) om beslutad ny regeringsform [Swedish Constitution], chapter 2 Section 18

⁵⁴ “The right to free basic education (IG 2:18, paragraph one) is in a strict sense absolute.” The Constitution of Sweden The Fundamental Laws and the Riksdag Act (2016), p 32

⁵⁵ See the Education Act (2010:800)

⁵⁶ HFD- 2013-501

⁵⁷ HFD-2014- ref-34

⁵⁸ According to chapter 10 Section 32 of the Education Act, children have a right to free school transportation funded by their resident municipality

⁵⁹ This obligation can be found under Chapter 10 Section 32 of The Education Act (2010:800)

⁶⁰ HFD 2013-501

⁶¹ HFD-2014- ref-34

⁶² RÅ 2002 ref. 91

obligated to arrange school transport for children who have alternating residence, though this obligation did not stretch beyond the borders of the municipality.⁶³ In this case, the court highlighted that the child has a right to education, and family life.⁶⁴ It further argued that the current Education Act lacked clarity for cases where the child had alternating residence - breaching the rights of individual children. The Court found that it was in the best interest of the child to have alternating residency between their two parents, supporting the child's right to family life under ECHR. If the municipality thus would refuse to grant the child free school transport, this would violate the main principles of the Education Act.⁶⁵ The court ruled that the municipality had the obligation to supply the costs for all transport to and from school thereby arguing in favour of the immediate realisation of the right to education.⁶⁶ The outcome of the case did not, however, give any suggestions to change the current law to include clarity for alternating residences which was suggested throughout the process. Since the court referred to the right to education and the right to family throughout the process and in the judgement, this case can be assessed within the AAAQ framework. The judgement in support of the child's right to two homes in conjunction with the right to free school transport falls within the criteria of availability and accessibility. The municipality has an obligation to ensure that there is a sufficient amount of resources for the realisation of children's rights, which can be secured by having fiscal space in the municipality's budget. Moreover, the municipality cannot discriminate against the child for having two equal homes by refusing school transport which would limit the child's access to education.

Under the right to education there have also been several cases concerning the right to assistance. In 2012,⁶⁷ and as late as 2019,⁶⁸ two municipalities went to court for similar reasons - their refusal to grant additional resources to private schools for pupils with special needs - arguing that public and private schools should be treated equally. The 2012 case ruled in favour of the municipality arguing that the special assistance could be granted within the set budget for all schools, any other decision would be unequal and regarded as unfair as the public schools, in similar cases, have been managing within the set budget.⁶⁹ In the

⁶³ See Chapter 10 Section 32 (paragraph 2) of the Education Act (2010: 800)

⁶⁴ These rights can be found under Article 18 and 28 of the UNCRC and Article 8 ECHR

⁶⁵ The main principle is the child's best interest, this is defined under Chapter 1 Section 10 of the Education Act (2010:800)

⁶⁶ This principle can be found in the constitution (1974:152) under chapter 2 Section 18

⁶⁷ HFD 2012: 46

⁶⁸ HFD 1320-19

⁶⁹ HFD 2012: 46

later, almost identical case, the court went in another direction by arguing that the equality principle could not be used in decisions on assistance. Instead decisions on additional resources should be decided on a case by case basis founded on individual assessments of each child's specific needs.⁷⁰ The outcome of this case can be assessed against the criteria of availability, accessibility, acceptability and quality as the ruling was that the municipality needed to have available resources to ensure the educational rights of children with special needs. Education should be accessible without discrimination even if the needs of the child result in a different perceptions of the same right. That is, these children are a minority who require additional resources and services that are different from the majority of other students. The abovementioned cases fail to mention the UNCRC articles throughout the court process and in the final judgement. Regardless, the court ruled on issues surrounding the municipality's budget and allocation of resources in relation to the child's right to education. The majority of the processes and outcomes are also relevant for assessing the fulfilment of the AAAQ framework criteria.

2.1.2. Right to housing

In 2004, an immigrant family with permanent residency appealed to the high court against the municipality's refusal to grant them welfare relief and failure to arrange adequate housing.⁷¹ The residential municipality had limited housing and could not provide the family with adequate housing. Instead, the family was offered housing and welfare relief in another municipality far up north. With this solution, the municipality argued that they no longer had an obligation to grant the family welfare relief. In the court process, it was reaffirmed that the governmental funding is meant to ensure the family's standard of living, this includes the obligation to provide adequate housing.⁷² The living situation for the family did not ensure an adequate standard of living and relevant to this report, the children's standard of living, health and development. Furthermore, the Court stressed the importance of having due regard to the children's best interest. The court ruled that the municipality must respect the family's wishes not to move and that the municipality's refusal to grant the family welfare relief was a

⁷⁰ HFD 1320-19

⁷¹ The right to welfare relief and housing can be found under chapter 4 Section 1 and 3 of the Social Security Act. The child has a right to benefit from social security and adequate housing in accordance with Article 26 and 27 of the UNCRC

⁷² In a big city such as Stockholm around which Nacka is situated, the municipality can in special circumstances and in agreement arrange housing in another municipality, this arrangement is monitored by the obligation to uphold an adequate standard of living. This obligation can be found in the second paragraph of chapter 4 Section 1

violation of the Social Security Act.⁷³ This case did not directly mention any UNCRC articles, regardless, the court assessed the case by referring to the children's best interest, development, health and standard of living, rights which can be found under the UNCRC.⁷⁴ This case concerned the inefficient budget of the residential municipality, where its lack of housing resulted in inadequate standard of living for a family. There were no indications that the municipality had plans on improving its lack of resources allocated towards adequate housing which proves that the municipality disregarded its immediate obligation for minimum core realisation of social and economic rights. Furthermore, this insufficiency breaches the criterion of availability as the municipality lacked the adequate amount of resources for the realisation of children's rights. The court took this into account during the process, regardless, the outcome and court's judgement was that the municipality had an obligation to ensure the family's right to housing and welfare relief, thus, affirming the immediate nature of these rights. Moreover, the preliminary housing facilities granted by the municipality were not of good quality resulting in a violation of the children's standard of living, health and development. In another case which was ruled on in 2013, the court assessed a municipality's decision to evict a family.⁷⁵ This case considered the foreclosure of property which would lead to a violation of the children's right to housing. Furthermore, the case involved the argument that eviction is a violation of Article 8 of the ECHR. In the case the court is arguably applying Article 3 of the UNCRC by stressing the unlawfulness of the eviction of children since it is not within the child's best interest.⁷⁶ The court found no case law involving a similar situation and the UNCRC was at the time only used as guiding principles when interpreting law. Despite this, the Supreme Court ruled that, with regard to the child's best interest, the foreclosure of the property would not be proportionate and should therefore be stopped, thus avoiding the eviction and homelessness of the family.⁷⁷ This last case is a clear example of how the Swedish court made a child rights assessment in relation to Article 3 of the UNCRC which protected the immediate realisation of the child's right to housing.

⁷³ RÅ 2004:130

⁷⁴ See UNCRC Article 3, 24, 26, 27

⁷⁵ NJA 2013 s.1241

⁷⁶ Here the court refers to Article 3 of the UNCRC

⁷⁷ NJA 2013 s. 1241

2.2. South Africa

Section 28 of the South African constitution sets out children's constitutional rights which adds to other rights found in the bill of rights such as the right to education.⁷⁸ In the South African jurisdiction, children are recognised as independent rights holders, and the South African Constitutional Courts regularly interpret children's social and economic rights as instantly justiciable.

“In addition to recognising everyone's fundamental human rights, the Bill of Rights in the Constitution contains a separate children's clause – Section 28 – which echoes the same rights for children, but uses stronger wording.”⁷⁹

The South African Bill of Rights contain a number of rights which are clearly influenced by the UNCRC such as the right to shelter, health and social services and civil and political rights such as the right to name and nationality, right against neglect and rights against child labour.⁸⁰ The only principle of the UNCRC which is given explicit protection under Section 28 is the best interests of the child which is stated as of “paramount importance”. The constitution falls short of mentioning the child's right to be heard, which is one of the main principles of the UNCRC,⁸¹ although Section 28 (1) (h) recognises the child's right to legal representation.⁸² The principle of progressive realisation of rights within the State's maximum available resources is found under many of the sections of the Bill's general social and economic rights such as the right to property, housing and education.⁸³ This principle is not included under the section of children's rights which excludes the obligations under Article 4 surrounding MAR and the fact that these rights have a minimum core from which they should be progressively realised.⁸⁴ ⁸⁵ Like Sweden and Scotland, South Africa has not ratified Optional Protocol no. 3 which grants children the right to bring communications to the

⁷⁸ Constitution of the Republic of South Africa, 1996 - Chapter 2: Bill of Rights [hereinafter Bill of rights], Section 28 and 29

⁷⁹ S Rosa and M Dutschke, “Child Rights at the Core: A commentary on the use of international law in South African court cases”, *A Project 28 Working Paper Children's Institute, University of Cape Town on children's socio-economic rights*, May 2006

⁸⁰ Bill of rights Section 28

⁸¹ see UNCRC Article 12

⁸² U Kilkelly & T Liefwaard, “Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa” *De Jure Law Journal* (2019) 521-539, p 527-528

⁸³ Bill of Rights, Section 25, 26, 27 and 29

⁸⁴ Although, as will be proven under the case law, children's rights can be realised under the other general social and economic rights found in the Bill of rights such as Section 26, 27 and 29.

⁸⁵ UNICEF, *Reforming child law in South Africa: Budgeting and Implementation planning*, 2007, p 12

Committee on the Rights of the Child.⁸⁶ Nonetheless, children's rights are justiciable under the constitution making it possible for children to bring their case to court.⁸⁷

2.2.1. Right to housing

Section 28 (1) (c) affirms children's rights to housing and shelter. The right to housing can be argued as a right which can be progressively realised, but children living on the street must immediately be provided shelter.⁸⁸ In *South Africa v. Grootboom*⁸⁹, a major social and economic case, the court for the first time interpreted and applied the right to access to adequate housing and children's immediate right to shelter.⁹⁰ In this case, the applicants and the High Court argued that the State had an immediate obligation to provide shelter to the child and their parents as Section 28 of the Constitution and the UNCRC affirm the undesirability to separate the children from their parents as well as the immediate nature of a child's right to shelter.⁹¹ The High Court's decision was appealed by the South African Government which argued that their obligation under Section 26 to take the "requisite measures" does not require the State to do more than its available resources permit thereby directly referencing Article 3 ICESCR, Article 4 UNCRC, and the principle of MAR. The Constitutional Court went against the High Court's interpretation of 28 (1) (c), stating that this right does not require immediate realisation.⁹² Instead the Constitutional Court held that the government had not met its constitutional obligation to provide the progressive right to housing, ordering the government to devise and implement a program within its available resources, to progressively realise the right to access adequate housing. The Constitutional Court concluded that the State must act to devise, fund, implement and supervise measures to provide relief to those in desperate need thereby including both families with and without children. In the final judgement the court does not mention children's rights but rather the overall obligation to progressively provide access to housing to everyone as stated in Section

⁸⁶ See Clan Child Law, "Access to justice for children in Scotland (Clan Child Law 2015) and STATUS OF RATIFICATION INTERACTIVE DASHBOARD, Optional Protocol to the Convention on the Rights of the Child on a communications procedure, [Last Updated: 28 Jul 2020] available at: <https://indicators.ohchr.org/> [accessed 11 August 2020]

⁸⁷ U Kilkelly & T Liefwaard, "Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa", *De Jure Law Journal* (2019) pp. 521-539, p 522-523

⁸⁸ UNICEF, *Reforming child law in South Africa: Budgeting and Implementation planning*, 2007, p 4-5

⁸⁹ *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46

⁹⁰ Bill of rights Section 26 and 28(1) (c)

⁹¹ The High Court held that the children's immediate right to shelter under Section 28 1(c) had been breached. See summary of the judgement *Government of the Republic of S. Afr. v. Grootboom*, [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (S. Afr.).

⁹² Bill of Rights Section 28(1) (c) provides: ""(1) Every child has the right— (c) to basic nutrition, shelter, basic health care services and social Services"

26. Thereby the court focused more on the process of budgeting rather than the outcome, overlooking the concept of there being a minimum core from which rights are progressively realised. The court process and outcome did discuss the allocation of resources with regard to equal treatment thus suggesting that the case could be assessed within the AAAQ framework. Regardless of the failure to mention children's immediate right to shelter in the final judgement, in accordance with Article 4 UNCRC and Article 3 ICESCR, the court ordered to set out a rights-based process by which, within the State's MAR, progressive realisation for the right to housing should be achieved. The five years after Grootboom showed a notable change and increase in public interest litigation which sometimes included the direct involvement of children. This was led by especially the Centre for Child law and had a transformative effect on the substance and outcome of constitutional jurisprudence on children's rights issues.⁹³ Sloth- Nielsen (2019) identifies eight areas of distinction which was transformed in the constitutional jurisprudence in relation to children's rights, that of "judicial approval of resource mobilisation for the fulfilment of children's rights, emphasis on the quality of and standards of education, the development of innovative remedies to deal with unreasonable State measure affecting children, and an increasing focus on the right to dignity of the child".⁹⁴

2.2.2. Social security

The outcome of *South Africa v. Grootboom* opened the door for further advocacy and interpretation of children's rights in the constitution. Later in the 2000s it is clear that the UNCRC along with other non-binding international law sources enriched and informed the jurisprudence of the South African courts. It could be further argued that South Africa went from being a dualist State to a monist State with regard to the interpretation of children's rights in international law.⁹⁵ Children's rights and interests became more prominent in judicial proceedings. Unlike the right to social security for "everyone" under Section 27, children's right in the constitution does not include any limitation in terms of the availability of resources. The South African government's Child Support Grant (CSG) which was the result of litigation

⁹³ U Kilkelly & T Liefwaard, "Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa" *De Jure Law Journal* (2019) 521-539, p532

⁹⁴ J Sloth Nielsen, "Children's rights jurisprudence in South Africa – a 20 year retrospective", *De Jure Law Journal* (2019) 501-520, p 503-504

⁹⁵ *Ibid.*, p 504

and advocacy from the civil society, grants children social support until 18 years of age.⁹⁶ *Khosa and others v. Minister of Social Development*, brought forward four years after *Grootboom*, concerned the right to social security under Section 27 and 28 of the constitution as the applicant challenged the provisions of the Social Assistance Act 59 of 1992.⁹⁷ In South Africa, permanent residents could not seek social assistance for their children, even if some of these children were citizens, thereby, the 1992 Act was an infringement of Section 27 and 28 of the constitution as every child and “everyone” has the right to social security. Furthermore, the law breached the accessibility criteria and the immediate right to non-discrimination as it was a barrier to the realisation of the child’s access to social security due to his or her parents lack of citizenship. The argument of “everyone” was brought forward as an argument under public interest which was denied by the high court. For this claim the Constitutional Court discussed the principle of equality in respect to access to social and economic rights.

“Socio-Economic rights must be understood in the context of the founding values of our (the South African) constitution... A denial of access to social welfare scheme may, as demonstrated by this case, therefore have an impact on more than one constitutional right. We are therefore concerned with a statute implicating multiple constitutional rights that reinforce one another at their point of intersection.”⁹⁸

The main discussion throughout the case was South Africa’s right as a State to deny benefits to non-citizens, arguing that this limitation was legitimate as it was meant to discourage immigration motivated by the availability of the welfare benefits. The court whilst discussing the issues, made a direct reference to the *Grootboom* case arguing that in this judgment the court held that 26 (1) places a negative obligation on the State to desist from preventing impairing the right to access to adequate housing and therefore, this applies to Section 27 as well.⁹⁹ The decision to enforce regressive measures had to be based on careful consideration and assure that the maximum of available resources had been used to avoid this decision.

⁹⁶ Neil Overy, “South Africa: Civil Society Uses Budget Analysis and Advocacy to Improve the Lives of Poor Children” (Washington, D.C., IBP, June 19, 2010). Available from: <http://internationalbudget.org/?l=&s=child+support+grant>.

⁹⁷ The impugned law was subsection 3 (c) of the Social Assistance Act 59 of 1992

⁹⁸ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004), paragraph 104

⁹⁹ (CCT 12/03) [2004], paragraph 109

In the case, the State's argument was that they were not the only State which limits their benefits to citizens only, furthermore, a permanent resident can, after 5 years apply for citizenship and gain the social security benefits which none of the applicants had done in this case. This argument did not reassure that the MAR had been used to avoid this decision. Additionally, the right to social security in accordance with the constitution was a right for "everyone" hence affirming the immediate right to access social security without discrimination. The court held that the 1992 Act failed to take sufficient account of Section 28 (2) of the Constitution, thus, the exclusion of these children from the access to social benefits could not be reasonable. The remedy for this case was an amendment of the 1992 Act to include "permanent resident" after "South African Citizen", additionally, the court ordered that the social grant of the applicants and those similarly situated should not be further delayed.¹⁰⁰ The final judgement of the court involved direct reference to children's constitutional rights and the need to take into account the child's best interest as a paramount consideration,¹⁰¹ which can be seen as a direct reference to one of the main principles of the UNCRC.¹⁰² This case is arguably proof of the development within the judicial proceedings, that of judicial approval of resource mobilisation for the fulfilment of children's rights and the development of innovative remedies to deal with unreasonable regressive State measures affecting children rights. Moreover, the case process and outcome is in line with the AAAQ framework by assessing the availability and accessibility of social security for permanent residents.

2.2.3. Right to education

Further development throughout the 2000s with regard to children's constitutional rights in South Africa were prominent within the educational sector. Major cases such as *Governing Body of the Juma Masjid Primary School & Others v. Ahmed Asruff Essay N.O. and others*¹⁰³ and *Madzodzo and others v. Minister of Basic Education*¹⁰⁴ confirmed the constitutional right to education under Section 29 as immediately enforceable which includes a minimum core obligation that cannot be subject to regressive measures.¹⁰⁵ These cases also touched upon the State's budgetary obligation in relation to children's social and economic rights. In

¹⁰⁰ (CCT 12/03) [2004], 88-89

¹⁰¹ (CCT 12/03) [2004], paragraph 136

¹⁰² See UNCRC Article 3

¹⁰³ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011)

¹⁰⁴ *Madzodzo and Others v Minister of Basic Education and Others* (2144/2012) [2014] ZAECMHC 5; [2014] 2 All SA 339 (ECM); 2014 (3) SA 441 (ECM) (20 February 2014)

¹⁰⁵ See (2144/2012) [2014] paragraph 15, 16, 35 and 36

Madzodzo and others v. Minister of Basic Education the applicants argued that the municipality's failure to supply age and grade suitable furniture to three public schools in the province was a violation of the learner's right to education, equality and dignity.¹⁰⁶ In response to this, the municipality offered to establish a reasonable plan of action within the shortest period of time to provide furniture to learners.¹⁰⁷ With this response, the municipality argued against the immediate realisation of education by referring to resource constraints, thereby disregarding the criteria of availability and accessibility for the realisation of the right to quality education. The court declared that the municipality was in breach of Section 29 and the learners' right to basic education. Thus they were ordered to ensure that all schools identified as having furniture shortages should be remedied by immediately receiving the furniture needed and to further ensure that each child have his or her own reading and writing space. The respondents were also ordered to pay for the applicants' legal costs.¹⁰⁸ The outcome of this judgment and the assessment made by the court is working within the AAAQ framework by assuring the children's availability, accessibility and quality education. Furthermore, the court affirmed the immediate effect of the minimum core obligation concerning the right to education, and the immediate nature of non-discrimination.

Another prominent case which specifically focused on the budgetary process in relation to children's right to education was *Centre for Child Law v MEC for Education*¹⁰⁹. This case concerned post provisioning for both teaching and non-teaching staff which affected the children's fundamental right to a basic education under Section 29 (1) (a) of the constitution. As a result of the Eastern Cape Education Department's failure to realise its budgetary obligations effectively and efficiently, there was an unequal distribution of teachers.¹¹⁰ The court ruled that "the governing bodies of public school have an obligation to take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners of the school."¹¹¹ The school budget must be prepared annually, all sufficient details must be provided, allow for audits and approval of a majority of the parents of the students.¹¹²

¹⁰⁶ See (2144/2012) [2014] paragraph 1 and 2

¹⁰⁷ (2144/2012) [2014], paragraph 12

¹⁰⁸ (2144/2012) [2014], paragraph 41

¹⁰⁹ *Centre for Child Law and Others v Minister of Basic Education and Others* (1749/2012) [2012] ZAECGHC 60; [2012] 4 All SA 35 (ECG); 2013 (3) SA 183 (ECG) (3 July 2012)

¹¹⁰ See (1749/2012) [2012], paragraph 12 and 15

¹¹¹ *Ibid.*, paragraph 21

¹¹² *Ibid.*, paragraph 21 and 22

Furthermore, the Court ordered remedies for the applicants, the respondents were to make sure that the educators' salaries were paid and the unequal gap in teacher positions were filled, remedies which would assure the realisation of basic education for all public schools. The governing bodies were also ordered to pay the applicant's court and counsel costs.¹¹³ This case is a clear example of a process within the AAAQ framework as well as justiciability for failure to progressively realise a right. That is, the school did not receive sufficient resources needed for a quality education due to the economic affordability. Furthermore, there was a lack of transparency and public information about the budget and resources allocation which lead to a corruption. Here the court identified the gaps and took on the obligation for the immediate realisation of the children's equal right to education. Lastly, the court ruled on the need for progressive realisation within the MAR and the need for transparency with annual reporting and publication of the budget, that is the information accessibility for the students and their parents to hold the provision accountable.

2.2.4. Right to health

The most breakthrough case with regard to the State's budgetary obligation towards children's social and economic right is arguably *Minister of Health and Others v Treatment Action Campaign and Others*.¹¹⁴ This case concerned the AIDS/HIV pandemic of South Africa and the distribution of preventative medicine for mother-child transmission of HIV. The issue at hand was that the government was;

- a) "refusing to make an antiretroviral drug called nevirapine available in the public health sector where the attending doctor considered it medically indicated and
- b) not setting out a timeframe for a national program to prevent mother-to-child transmission of HIV."¹¹⁵

The argument was that due to this insufficiency the State violated the right to public health¹¹⁶ and most relative, the child's right to basic health under Section 28 (1) (c) of the constitution. Furthermore, with regard to Section 27 (2) of the constitution, the case assessed if the State

¹¹³ Ibid., paragraph 35

¹¹⁴ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002)

¹¹⁵ (CCT 8/02)[2002], paragraph 2

¹¹⁶ Bill of Rights Section 27 (1)

had an obligation to “plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country.”¹¹⁷ This assessment corresponds with the obligation under Article 4. The judgement uses similar language to that of Article 4 by stating that the State’s policy was inconsistent with the constitution and must be changed to remove the restriction that made the medicine inaccessible to hospitals and clinics. The court argued that once the policy is changed, it:

“must meet the constitutional requirement of providing reasonable measures within available resources for the progressive realisation of the rights of such women and newborn children”¹¹⁸

The case also discussed the issue of transparency with regard to the programmes where the mother and child would receive treatment. Due to the uncertainty and magnitude of the pandemic, it was vital that the government had well-organised communication with the public. The treatment programme also needed to reach all parts of society to prevent and fight the pandemic. The existing programmes did not exist in all provinces thus the treatment was not accessible to a large proportion of the population.¹¹⁹ The court ruled in favour of the applicants and ordered the State to progressively, within their available resources, implement a comprehensive programme to realise the rights of the pregnant mothers and their newborns. The preventative medicine would also be made available at all public hospitals and clinics.¹²⁰

This case is proof of a court proceeding which worked to fulfil the criteria of the AAAQ framework by assuring the State’s obligation to provide available, acceptable, accessible and quality realisation of the right to health. This was achieved by making sure that the medicine and treatment would be available throughout the State by ordering a change in the existing policy and the reallocation of the available resources.

2.3. Concluding findings

The most noticeable difference between the two jurisdictions is the constitutional status of children’s rights. As abovementioned, the Swedish constitution only directly refers to

¹¹⁷ (CCT 8/02) [2002], paragraph 5

¹¹⁸ Ibid., paragraph 122

¹¹⁹ Ibid., paragraph 123

¹²⁰ Ibid., paragraph 135

children's rights in a goal-oriented clause found in chapter 1. Apart from this, the Swedish jurisdiction argues that the other human rights found in the constitution under chapter 2 includes all ages thus raising a question of how enforceable children's right really are in Sweden.¹²¹ By contrast, the South African constitution has a specific enforceable section fully dedicated to children's rights. Both jurisdictions have seen change over time in court proceedings and rulings regarding children's social and economic rights. The Swedish jurisdiction has case law with relatively similar proceedings but different outcomes, whilst the South African case law is relatively proportionate and predictable.¹²² The irregularity within the Swedish case law can be seen as the result of a shift in the jurisprudence where interpretations of UNCRC rights during court proceeding start to become more included, leading up to the direct incorporation in 2020. This could also be the result of the indirect incorporation of the UNCRC, where the Swedish domestic law includes the main principles of the UNCRC such as the right to non-discrimination and the child's best interests. The early years of South African case law - and especially the *Grootboom* case - were arguably driven by the idea that children's rights were understood as family rights, a misconception which can be found through the early cases of both jurisdictions. The outcome of *Grootboom* shows the importance to reaffirm that it is not only about incorporating children's rights into legislation but the realisation of children's rights in practice. A section dedicated to children's rights in the constitution is not enough if these rights are not realised in practice during court proceedings. That is, in *Grootboom*, the South African government did not see children as independent rights holders but rather as tools for realising the interests of the family and most prominently the parents and guardians.¹²³ This misconception is reiterated by Nolan (2011) who argues that if we fail to take children's distinct needs and interests into account when we consider the needs of households then the needs of the adult members of the family are prioritised.¹²⁴ By contrast, the Swedish cases under the right to housing see children as independent right holders whereby the immediate nature of children's rights protects the right of the family not to be evicted or to fulfil the right to adequate housing.¹²⁵ The Swedish case law is predominately focused on the child's best interests which, as aforementioned, is a

¹²¹ T Mattsson, "Constitutional Rights for Children in Sweden", in Trude Haugli, Anna Nylund, Randi Sigurdson, Lena R.L. Bendixsen (eds) *Children's Constitutional Rights in the Nordic Countries*, Leiden ; Boston : Brill, 2020, pp 103-119, p 114

¹²² Excluding the *Grootboom* case

¹²³ "Constitutional Court of South Africa: The Government of the Republic of South Africa & Rs v *Grootboom* & Ors." *Rewriting Children's Rights Judgments: From Academic Vision to New Practice*. Ed. Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore. Oxford: Hart Publishing, 2017. 319–328, p 322

¹²⁴ A Nolan, *Children's Socio-Economic Rights, Democracy and the Courts*. (London: Hart Publishing, 2011), p 7-9

¹²⁵ See HFD 2012:46 and HFD 1320-19

result of its incorporation into the Swedish Constitution and domestic law. None of the cases above, regardless of jurisdiction, mention Article 4 UNCR. Instead, the cases all cover forms of child rights assessment in relation to the municipalities' or the States' budget and available resources.

In the Swedish case law there was a clear shift in the courts' processes and outcomes for rulings on the right to additional resources for children in need of educational assistance. In the 2012 judgement, the court ruled that in accordance with the equality principle, private schools should not be granted additional funding for assistance the municipality deemed accessible within the set budget. During the court process there was no discussion which could be analysed as working within the AAAQ framework as the court did not assess the individual student's right to education with regard to the criteria. This led to an outcome which ruled in favour of the municipality thus affecting the student's access to accessible and quality education which could only be met with the additional resources. In the case from 2019, the court process and outcome could be identified as working within the AAAQ framework. The outcome of the case was that when a municipality would rule on granting additional resources for special assistance, each case would be required to have due regard to the individual student's needs. Furthermore, the court ruled that the relevant school would be granted additional resources as it was needed for the realisation of the student's right to education. That is, to fulfil the criteria of accessible, acceptable and quality resources needed for the realisation of this student's right to education with regard to his or her special needs.

Under the right to education and the right to housing, both jurisdictions have cases where the court ruled in favour of the immediate nature of these rights regardless of the municipalities or the State's arguments about lack of available resources or housing.¹²⁶ Both jurisdictions also include the right to education in their constitutions, but it's only the South African constitution which has a section for the child's right to housing and shelter. This right has been recognised as immediate in the court process by the High Court but was later interpreted as progressive by the Constitutional Court which creates uncertainty in predicting the outcome of cases under Section 28 (1) (c). The outcome of *Grootboom* could not be assessed against any of the AAAQ framework criteria as the government's immediate obligations towards children's right to housing under the criteria were ignored. Hence, the

¹²⁶ See RÅ 2004:130 and (2144/2012) [2014]

South African Court took a completely different approach from that of the Swedish despite its direct incorporation of the UNCRC - thus illustrating that regardless of how a State chooses to incorporate the UNCRC, the court process and outcomes need to conform with the rights to ensure their realisation. The South African disagreement over the interpretation of the right to housing show yet another misunderstanding surrounding children's social and economic rights which is to define these rights as "positive" that is, arguing that these rights do not involve any immediate obligations on the State. The South African Constitutional Court's outcomes which initiated an immediate realisation of children's rights were most prominent under the child's right to education. The outcomes of these cases included extensive remedies, which are of great importance because without remedies for violations, rights are only of symbolic value.¹²⁷ It is therefore positive that under the right to education, in accordance with the recommendations of *General Comment no. 5*, the litigation resulted in the distribution of innovative remedies. This demonstrates that seeking justice for social and economic rights in court can result in change for the situation of children's social and economic rights.

The abovementioned case law under the right to social security saw cases from both jurisdictions where immigrant families with permanent residence brought their right to social security to court.¹²⁸ Here we see a clear contrast in how the two governments view their obligations towards non-citizens' rights. In the Swedish case, there was no hesitation with regards to viewing the permanent residents as rights holders and thus arguing in favour of the family's right to social security and housing. This was reaffirmed by a 2010 constitutional reform, which assured wider application of the constitution to include all children and adults residing in Sweden.¹²⁹ By contrast, the South African case process included an extensive discussion where the government argued that it was not its obligation, nor within its MAR to grant non-citizens the right to social security. Although the processes of the two cases were different, they both had similar outcomes which saw the immediate realisation of social security for the families.¹³⁰ The South African court went as far as holding the 1992 Act accountable for breaches against children's rights to social security as it failed to take account

¹²⁷ U Kilkelly & T Liefwaard, "Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa" *De Jure Law Journal* (2019) 521-539, p525

¹²⁸ See RÅ 2004:130 and (CCT 12/03) [2004]

¹²⁹ T Mattsson, "Constitutional Rights for Children in Sweden", in Trude Haugli, Anna Nylund, Randi Sigurdson, Lena R.L. Bendiksen (eds) *Children's Constitutional Rights in the Nordic Countries*, Leiden ; Boston : Brill, 2020, pp 103-119, p 113

¹³⁰ (CCT 12/03) [2004], 88-89

of Section 28 (c) of the constitution. The court held that as a remedy, the 1992 act would be amended to include the rights of “permanent resident” which would be in line with “everyone’s” constitutional right to social security. Here, we see that regardless of whether the right to social security is included in the constitution, due to the immediate nature of social security for children and their families this right results in similar outcomes within each jurisdiction.

The understanding and interpretation of MAR in South African court processes and outcomes concerning children’s rights, corresponds with the obligations under Article 4 which is especially evident in the *Minister of Health and Others v Treatment Action Campaign and Others*. This case demonstrates how the wording of Article 4 can be used to call for a transparent and equal implementation and realisation strategy for the progressive realisation of rights, which would, when using the tools of the AAAQ framework ensure equal distribution and quality access to health. This case is an excellent learning example for other jurisdictions’ legislatures, which are pursuing to incorporate the UNCRC. The Swedish case law is not as equivalent in referring to MAR and Article 4, although most cases presented above did promote the immediate realisation of children’s rights regardless of MAR. Furthermore, court orders which oversee the budget to make sure that the allocation of the available resources are efficient and equally distributed can be found under both jurisdictions. There is some evidence in the case law that South African courts are following elements of the general comment’s guidelines and tools found in the AAAQ framework. The Constitutional Court is seen to use rights-based scrutiny of budgetary decisions which is made possible due to the enforceability and strength of incorporating children’s rights into the constitution. The outcomes of the South African case law, excluding *Grootboom*, bring evidence of this.¹³¹ Such judicial developments are positive, as they encourage the government to consider rights at the outset of budgetary decision-making, and support rights-based scrutiny.¹³² The South African jurisprudence is arguably more far-reaching and explicit in its reference to children’s rights than the pre-2020 Swedish case law considered.¹³³ This could in part be due to the passage of time since children’s rights were directly incorporated into the South African

¹³¹ U Kil Kelly & T Lief aard, “Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa” *De Jure Law Journal* (2019) 521-539, p 535

¹³² U Kil Kelly & T Lief aard, “Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa” *De Jure Law Journal* (2019) 521-539, p 535

¹³³ J Sloth- Nielsen, “Children’s rights jurisprudence in South Africa- a 20-year retrospective”, *De Jure Law Journal* (2019), p511

constitution and the rich case law that has developed over the past 20 years.¹³⁴ Jurisdictions which have recently incorporated the UNCRC may see a similar development over time.

3. Recommendations to Scotland

3.1. Executive

As seen in *Grootboom*, it is a common misconception to analyse children's rights from the perspective of the family rather than view children as rights holders in themselves. Children have distinct interests and needs, and if decision makers fail to take these into account when considering the needs of households then the needs of the adult family members are prioritised.¹³⁵ To counter this, the Scottish Government needs to use high quality child rights impact assessments which recognise that children are not only beneficiaries of government programmes but should also be active participants in policy and budgetary processes.¹³⁶ These impact assessments should be conducted for all decisions affecting children – whether directly or indirectly – and subject to regular review.

Learning from the South African cases surrounding the right to education,¹³⁷ the Scottish Government should always, within its maximum available resources, ensure a transparent and equal distribution of resources for the realisation of children's right to education. If any branch of the State fails to uphold this obligation, the courts should be able to hold the State accountable and ensure that these rights are immediately realised.

3.2. Legislature

The incorporation of the UNCRC will, as seen in *Khosa and others v. Minister of Social Development*, give courts the power to find law incompatible with children's rights and ask the legislature to amend it. The Scottish Parliament should, learning from the process and outcome *Khosa and others v. Minister of Social Development* case, within the AAAQ framework, oversee and amend relevant legislation concerning children's social and economic rights to ensure that these rights are available, accessible and acceptable for every child living in Scotland.¹³⁸

¹³⁴ *Ibid.*, p 512

¹³⁵ A Nolan, *Children's Socio-Economic Rights, Democracy and the Courts*. (London: Hart Publishing, 2011), p 7-9

¹³⁶ General Comment no 19

¹³⁷ See (2144/2012) [2014] and (1749/2012) [2012]

¹³⁸ (CCT 13/03, CCT 12/03) [2004]

The Scottish Parliament should further learn from the South African jurisdiction by ensuring robust rights-based scrutiny of budgetary decisions proposed by the government and identifying and mitigating any negative effects upon the realisation of children's social and economic rights.¹³⁹

3.3. Courts

In proceedings involving the child's right to housing as presented in the Swedish cases, the courts should always assess within the criteria of the AAAQ on the immediate nature of the child's right to housing to avoid the eviction and homelessness of children. The judiciary (and legislature) should never weigh the child's rights against that of their parents, like in the *Grootboom* case, the child's best interest should always be the paramount consideration.

Learning from the Swedish cases on additional resources for educational assistance, Scottish court proceedings must consider each individual child's needs and rights. In accordance with the acceptability criteria, the courts must do a subjective assessment of each child's perceptions on the delivery of the relevant resources. This is especially important if the child belongs to a minority group or culture.

In addition to the legislature, the Scottish courts should learn from the South African and Swedish jurisdictions and caselaw on how to engage with the AAAQ in court proceedings involving children's social and economic rights under the UNCRC.¹⁴⁰ If the courts use the tools of the AAAQ framework, the court process and outcome will further strengthen the immediate nature of non-discrimination and the progressive realisation of children's social and economic rights.

¹³⁹ See (2144/2012) [2014] and (1749/2012) [2012]

¹⁴⁰ See, HFD 1320-19, RÅ 2004:130, (1749/2012) [2012], and (CCT 8/02)[2002]

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