

# Constitutionalising the right to early childhood development in South Africa

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### **1. Introduction**

The South African Constitution provides explicit recognition and protection for a range of children's rights. This includes, amongst others, a child's right to family or parental care;<sup>1</sup> shelter; basic nutrition; basic health care services; social services;<sup>2</sup> and basic education.<sup>3</sup> The best interests of the child must also be considered paramount in every matter concerning them.<sup>4</sup> Despite this array of child-specific rights, the Constitution does not explicitly articulate the right to early childhood development, holistically understood.

It is well-accepted that early childhood is an extremely important time in a person's life. In this critical phase, young children develop more rapidly than at any other time, they are more susceptible to external influences, and the foundation is laid for their future well-being and life outcomes. In order to survive, develop, and thrive, young children need early learning opportunities, responsive caregiving, adequate nutrition, good health, safety and security, opportunities to play and opportunities to participate in cultural life. The first five of these components of holistic early childhood development are reflected in the Nurturing Care Framework, which was developed by the

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<sup>1</sup> Section 28(1)(b) of the Constitution.

<sup>2</sup> Section 28(1)(c) of the Constitution.

<sup>3</sup> Section 29(1)(a) of the Constitution.

<sup>4</sup> Section 28(2) of the Constitution.



World Health Organization, World Bank and UNICEF and which applies particularly to children aged 0 to 3.<sup>5</sup> It is important to note that the various components are interconnected: they are all required for holistic development; they will all be present in a nurturing environment; and they may often be delivered simultaneously, via a single activity or in a single setting.

Since the South African Constitution does not explicitly articulate a right to early childhood development, does this mean that children simply do not have such a right in this country? The purpose of this framework is to demonstrate how a holistic conception of the right to early childhood development can and should be recognised under South Africa's constitutional framework. This is important for a number of reasons. First, constitutionalising rights elevates a need, interest or claim to the highest point in a legal system – this entrenchment makes it more difficult to deny or erode the legitimacy of those claims. Recognition of early childhood development as a constitutional right would mean that this fundamental interest is afforded the same constitutional protection and priority as other fundamental interests found in the Bill of Rights. Second, rights can be an effective tool for legal mobilisation - rights claims command the respect of others in society and can be invoked so that claims are taken seriously. Mobilising around a right to development can be helpful for laying the foundation for a national campaign to ensure that all young children access quality early childhood development services. Third, rights play a role in articulating essential state obligations – so that these are not viewed merely as nice-to-haves. A right to development would set a standard against which existing laws and policies can be assessed and would necessitate the alignment of all laws and policies with the content of that right and the corresponding duties.<sup>6</sup>

In establishing a right to early childhood development, section 39(1)(b) of the Constitution is of central significance. That section provides that courts must consider international law when interpreting rights in the Bill of Rights. A child's right to development is well-established in international law. The Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child requires states to ensure to the maximum extent possible the survival and development of the child.<sup>7</sup> These instruments, as well as the commentary of

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<sup>5</sup> Nurturing Care for Early Childhood Development: A Framework for Helping Children Survive and Thrive to Transform Health and Human Potential p 3.

<sup>6</sup> While the National Integrated Early Childhood Development Policy (2015) currently recognises ECD as a 'universal right and public good', this policy statement is not fully reflected in legislation relevant to children's early development.

<sup>7</sup> Article 6 of the UN Convention on the Rights of the Child; Article 5 of the African Charter on the Rights and Welfare of the Child.



international committees, recognise that children's development must be understood holistically, and that they have a right to physical, mental, spiritual, moral, emotional, psychological, social and cultural development and development of their personality and talents.<sup>8</sup>

The question that arises is whether, and how, existing constitutional rights can be interpreted to encompass a broad right to development?

One candidate may be the right to basic education, which the courts have recognised is an immediately realisable right. This is an appealing option considering the extensive jurisprudence already developed in respect of this right. However, a right to basic education can, at best, be extended to encompass early childhood education.<sup>9</sup> This is just one aspect of children's development. Trying to shoehorn all aspects of a child's development (including nutrition, health, responsive caregiving etc) into education both stretches the right to basic education beyond its plausible limits and leads to the problem of constricting the scope of the right to development to an education-related paradigm. So, while the right to basic education may be an important component of children's right to development, it is not equivalent to it.

Another candidate is the provision requiring the best interests of the child to be considered paramount. This provision is certainly broad but is not specific enough. It is not concerned specifically with the development of a young child, but with the interests of children more generally. As children's rights experts have noted, relying too heavily on the concept of the best interests of the child risks bloating it so that the specific rights and duties in respect of children become difficult to discern.

A final option would be to interpret the right to life<sup>10</sup> and/or dignity<sup>11</sup> in light of international law to encompass a right to development.<sup>12</sup> This avenue has the benefit of recognising a holistic right to development for young children as necessary for their flourishing. However,

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<sup>8</sup> UN Committee on the Rights of the Child General Comment No.7 (2005).

<sup>9</sup> International law may be used to support this argument, see S Fredman et al 'Recognizing early childhood education as a human right in international law' *Human Rights Law Review* (2022) 22(4) 1-20.

<sup>10</sup> Section 11 of the Constitution.

<sup>11</sup> Section 10 of the Constitution.

<sup>12</sup> For a detailed argument on the right to life being interpreted to include the right to development, see Ally N, Parker R, Peacock TN 'Litigation and social mobilisation for early childhood development during COVID-19 and beyond' *South African Journal of Childhood Education* (2022) 12(1) 1, 7-9.



this option would ideally be complemented by an approach that identifies the discrete components – where possible – of holistic early childhood development so as to facilitate the clear articulation of the duties that relate to each component.

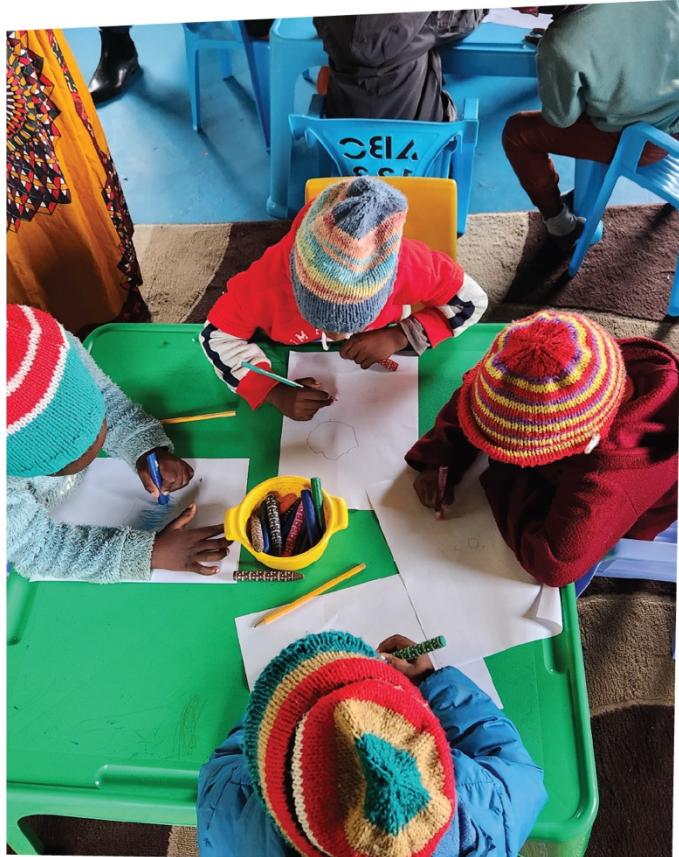
Our approach involves interpreting a range of different Constitutional rights in light of international law. This allows us to articulate a range of specific entitlements and duties, as they relate to the overarching right of the young child to holistic development. A useful analogy here is an umbrella: our approach recognises both the canopy (the overarching right to early childhood development) and each of the individual spokes (the specific rights to early learning opportunities, nutrition, responsive caregiving, etc and the corresponding duties). The canopy is important, because it ensures that the connections between rights are recognised and also facilitates the recognition of aspects of early childhood development that do not map neatly onto existing rights (e.g. rest, leisure, play and possibly early learning). The spokes are important, because they are clear and specific, allowing us to clearly articulate the relevant duties and identify the appropriate duty-bearers, thus offering robust support for the canopy.

The point of departure for our framework is to consider the purpose of the overarching right to early childhood development and the duties that correlate to the overarching right. We then identify the different components of the overarching right, with reference to international law, and map each component on to existing rights in our Constitutional scheme. For a more fine-grained understanding of the specific entitlements and duties arising from the overarching right to early childhood development, we identify the outcomes that should be secured for each component of the right, and the inputs necessary to achieve those outcomes. Having done so, we then consider the specific duties and duty-bearers in relation to the various aspects of the right to development.

One limitation of our framework is that it does not specify which government department and/or sphere of government bears each of the correlative duties. Further, it does not detail when obligations may be immediately or progressively realisable. Some outstanding questions relating to the framework include: What age range does the right to early childhood development cover? In particular, does it cover the period before birth? What duties do non-state actors, such as ECD providers, bear in respect of the right to early childhood development?

Our framework for locating the right to early childhood development in the South African Constitution is outlined in the next section. The key provisions we rely upon are set out in full in the Annex.





## 2. Framework for locating the right to early childhood development in the South African Constitution

### RIGHT-HOLDER: THE YOUNG CHILD

Rights-holder = children (up to 18 years); our focus = young child (up to 5 years)

The young child is both 'human being' AND a 'human becoming' (Noam Peleg)



***Note: A young child may be unable to bring a claim to enforce their own rights, but this does not mean that they cannot be right-holders. For a child to have a right, it needs to be the case that the child's interest is sufficient to ground at least one duty on the part of at least one duty-bearer.***

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### PURPOSE OF THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT

The overarching purpose of the right to development is to secure dignity, equality and freedom (understood according to the capabilities approach) for all children: all children have should the capabilities and opportunities to shape their own lives and to carry out their chosen functions (that is, things that they value being and doing). This kind of freedom is necessary to live a dignified life.

This is underpinned by the constitutional values of dignity, equality and freedom.



## **OVERARCHING RIGHT TO EARLY CHILDHOOD DEVELOPMENT**

**Young children have a right to physical, mental, spiritual, moral, emotional, psychological, social and cultural development and development of their personality and talents.**

Section 11 of the Constitution (right to life), section 10 (right to dignity), as well as section 16 (right to freedom of expression), section 28 (children's rights), section 29(1)(a) (right to basic education), and section 31(1) (right to cultural life)

### **Section 91 of the Children's Act**

Interpreted in light of international law: the right to life, survival and development under Article 6, plus Articles 5, 18, 19, 23, 24, 27, 29, 31 and 32(1), of the UN Convention on the Rights of the Child (UN CRC) and Article 5, plus Articles 11(2)(a), 13(2), 15(1), 20(1), and 21(1), of the African Charter on the Rights and Welfare of the Child (ACRWC)

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## **CORRELATIVE DUTIES**

Young children have a right that:

Parents / primary caregivers provide and create the conditions necessary to ensure the child's holistic development;

The state provides assistance to their parents/primary caregivers, where needed, on an equitable basis, so that the parents/primary caregivers can fulfil their duty to ensure the child's holistic development (this may require the state to fulfill the duty directly where the parent/caregiver is unable to do so, even with assistance);

The state creates and implements effective coordination mechanisms to ensure the child's holistic development;

The state ensures sufficient funding is available for the fulfilment of their duties



## RIGHTS TO EACH SPECIFIC COMPONENT OF EARLY CHILDHOOD DEVELOPMENT

Necessary components of development in early childhood include all five elements of the nurturing care framework (responsive caregiving, safety and security, early learning opportunities, good health and adequate nutrition). Young children have rights to each of the five elements. Other necessary components include play and opportunities to participate in cultural life. Young children also have rights to these components.



RIGHT TO RESPONSIVE CAREGIVING	RIGHT TO SECURITY, SAFETY AND A HEALTHY ENVIRONMENT	RIGHT TO EARLY LEARNING OPPORTUNITIES	RIGHT TO GOOD HEALTH	RIGHT TO ADEQUATE NUTRITION	RIGHT TO CULTURAL LIFE	RIGHT TO REST, LEISURE AND PLAY
Section 28(1)(b) of the Constitution Interpreted in light of Articles 5, 18, 20 and 27 of the UN CRC and GC 7 Articles 19, 24 and 27 (2005)	Sections 28(1)(c) and (d) and 24 of the Constitution Interpreted in light of the UN CRC and GC 7 Articles 19, 24 and 27 (2005)	Sections 11 and/or 29(1)(a) of the Constitution Interpreted in light of Articles 6 and 29 of the UN CRC and GC 7 (2005)	Section 28(1)(c) of the Constitution Interpreted in light of Articles 6 and 24 of the UN CRC and GC 15 (2013)	Section 28(1)(c) of the Constitution Interpreted in light of Articles 6 and 24 of the UN CRC and GC 15 (2013)	Section 31(1) of the Constitution Interpreted in light of Article 31 of the UN CRC and GC 17 (2013)	Sections 10, 11, 16 and 29(1)(a) of the Constitution Interpreted in light of Articles 6, 29 and 31 of the UN CRC and GC 7 (2005) and GC 17 (2013)



## OUTCOMES

Each of these rights also require certain inputs, which are informed by the intended outcomes of the rights.

**Note: This is a preliminary and illustrative list of outcomes and inputs – it is not meant to be comprehensive at this stage**

Child who:	Child who:	Child who:	Child who:	Child who:	Child who:	Child who:
Has the ability to emotionally self-regulate and socialise as appropriate for their age or developmental stage.	Is free from maltreatment, neglect and violence.	Has literacy and numeracy skills as appropriate for their age or developmental stage.	Is able to grow and develop to their full potential.	Is free from malnutrition and stunting. Develops physically and mentally to their full potential.	Has sense of belonging. Enjoys the cultural and artistic life of their family, Is healthy and well-nourished. Is able to experience physical, mental and social well-being (not merely the absence of disease or infirmity).	Explores their creativity and imagination. Has a sense of self and identity. Is able to engage in independent and self-driven activity. Has a sense of playfulness and engages in play. Experiences joy.
Has the ability to form secure attachments as appropriate for their age or developmental stage.	Is free from threats to their bodily and psychological integrity.	Has the ability to emotionally self-regulate and socialise as appropriate for their age or developmental stage.	Is not exposed to environmental health risks.	Is healthy and well-nourished.	Community and society.	
Has a caring and loving connection to caregivers.	Enjoys an environment conducive to their health and well-being.	Has processed any trauma arising from maltreatment, neglect, violence or other unsafe experiences.			Has a sense of self and identity as it relates to their community.	



## INPUTS

Care from parents and primary caregivers, where the child's signals are noticed, understood and responded to in a timely manner.	A safe home environment, including adequate shelter, water, sanitation, power, and so on.	Age-appropriate early learning activities.	Timely and appropriate prevention, health promotion, curative, rehabilitative, and palliative services.	Nutritionally adequate, culturally appropriate and safe food.	Opportunities to explore and understand the cultural and artistic heritage of their community, participate in, create and shape it.	Availability of rest appropriate to their age and development; Availability of leisure time, free from other demands;
Parent and family support programmes.	Safe early learning and play environments.	Age-appropriate early learning materials, such as developmentally appropriate books and toys.	Effective direct nutrition interventions for pregnant and lactating women.	Growth monitoring and stunting interventions e.g. vitamin supplementation as necessary.		Accessible space and time for play, free from adult control and management;
	Social services as necessary.	Nutrition necessary to engage in early learning opportunities.	Early identification of developmental delays.	Vaccinations and other health care services.		Space and opportunities to play outdoors unaccompanied in a diverse and challenging physical environment, with easy access to supportive adults, when necessary.
	Social support grants as necessary.	Assessment of whether the child is developmentally on track as measured by performance across gross motor development; fine motor coordination and visual motor integration; emergent numeracy and mathematics; cognition and executive functioning; and emergent literacy and language.	Regular health check-ups.			Opportunities to interact with and play in natural environments and the animal world.
	Cognitive therapy and other psychological support services, as necessary.	Early identification of barriers to learning and referrals to support as necessary.				Opportunities to participate with other children in games, sports and other recreational activities.



## CORRELATIVE DUTIES

Parents and primary caregivers, the state, and non-state ECD providers all have correlative duties related to the inputs.

Parents and primary care givers	Parents and primary caregivers have duties to provide a safe home environment. They have duties to notice, understand and respond to their child's signals in a timely manner.	Parents and primary caregivers have duties to provide an environment conducive to age-appropriate early learning opportunities, including through provision of age-appropriate early learning materials and adequate nutrition.	Parents and primary caregivers have duties to provide an environment conducive to age-appropriate early learning opportunities, including through provision of age-appropriate early learning materials and adequate nutrition.	Parents and primary caregivers have duties to attend to their children's health needs, including ensuring they receive regular health check-ups and vaccinations.	Parents and primary caregivers have duties to provide their children with nutritionally adequate, culturally appropriate and safe food.	Parents and primary caregivers have duties to offer their children opportunities to explore and understand the cultural and artistic heritage of their community.	Parents and primary caregivers have duties to provide their children with the space, time, and opportunities for rest, leisure, play and recreation.
State	If the child is in the state's care, then the state has duties to provide a safe home environment. The state has duties to take reasonable and effective steps to regulate the safety of the child's home and early learning environments. The state has duties to support parents and primary caregivers to provide a safe home	The state has duties to support parents and primary caregivers' ability to provide children with age-appropriate early learning opportunities, including through provision, state subsidies for early learning programmes and/or parent support programmes. The state has duties to take reasonable and effective steps to ensure the availability, accessibility and affordability of quality age-appropriate early learning opportunities for all children on an equitable basis.	The state has duties to support parents and primary caregivers' ability to provide children with age-appropriate early learning opportunities, including through provision, state subsidies for early learning programmes and/or parent support programmes. The state has duties to take reasonable and effective steps to ensure the availability, accessibility and affordability of quality age-appropriate early learning opportunities for all children on an equitable basis.	The state has duties to support parents and primary caregivers' ability to attend to their children's healthcare needs, including through provision of child healthcare services.	The state has duties to support parents and primary caregivers' ability to provide their children with adequate nutrition. The state has duties to provide effective nutritional support for pregnant and lactating women.	The state has duties to take reasonable and effective steps to facilitate children's ability to engage in safe play and recreation. The state has a duty to provide effective nutritional support for all children on an equitable basis.	The state has a duty to take reasonable and effective steps to facilitate children's ability to engage in safe play and recreation. The state has a duty to ensure children are able to access safe natural environments and play parks.



parents with parent support programmes, where necessary.	environment, through measures such as the Child Support Grant. The state has duties to take reasonable and effective steps to ensure children have adequate nutrition to support their early learning needs. that ensure children are in safe and secure environments, free of violence and neglect.	The state has duties to support appropriate early learning opportunities for children with disabilities.	all children on an equitable basis.	parents, including pregnant women.	The state has a duty to provide opportunities for children to participate in games, sports and other recreational activities.
The state has duties to regulate and ensure a capable ECD workforce.					

Private ECD service provider

Private ECD service providers also have some duties in respect of young children's rights to development.





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