

# **That time of the month: discrimination against girl children who cannot afford sanitary health care**

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## **ABSTRACT**

The majority of women, and only women, experience a biological reality approximately every 28 days. Menstruation is a nightmare for some, but particularly for the group of indigent women and adolescent girls who cannot afford sanitary health care products that will enable them to manage their period effectively. These monthly necessities for women are also subject to Value Added Tax in South Africa, adding an additional 15% to the price. This lack of access to adequate sanitary wear affects only females, and it affects their rights significantly. Not only does it violate girl children's dignity and self-worth, but exacerbates the feminisation of poverty by infringing their right to education and health and negatively affects the realisation of gender equality. This chapter examines this instance of discrimination against girls by describing the failure of the South African government to consider the best interests of girl children in this specific respect.

## **KEYWORDS**

Discrimination based on sex; gender inequality; violation of children's rights to education, health, dignity, development.

## **Introduction: a monthly reality**

Poverty is a harsh reality for many South Africans. According to a 2011 Report by Statistics SA, 45.5 percent of South Africans are considered "poor" and as such unable to purchase necessary food items. 32.3 percent live under the Lower Bound Poverty Line, which means that they can afford essential food items, but in order to afford necessary non-food items, they would have to sacrifice the purchase of certain food items (Statistics South Africa, 2014). Even harsher a reality is that poverty appears to discriminate between the two sexes and has a disproportionate impact on women: in the most recent SANHANES study, it was reported that more women (15.5 percent) than men (4.7 percent) fell into the monthly income level of less than R800 (€50) (Shisana, et al., 2014).<sup>1</sup> One of the consequences of this reality is that a large

number of women and girls cannot effectively manage their health care in respect of menstrual hygiene (African Population and Health Care Research Centre's Report, 2010, p. 3). It is estimated that a third of South African females are unable to afford sanitary towels and are forced to use alternatives which are often unhygienic (Ramathumba, 2015, p. 5). This has the effect that, on a monthly basis, an estimated one-third of female learners in South African schools do not attend school when they are menstruating since they cannot afford sanitary pads or tampons. If it is borne in mind that women use an average of 25 sanitary towels during their menstruation, and that the average price of a packet of sixteen sanitary pads is R23 (€1,50), it is estimated that the 15,5 percent of women whose monthly income is approximately R800, spends about 5 percent of their income on their period.<sup>2</sup>

An additional factor which causes an increase to the cost of sanitary health care products, lies in the fact that such products are subject to Value Added Tax (VAT).<sup>3</sup> As of April 2018, VAT in South Africa is levied at 15 percent, even though certain – mostly food – items that are considered necessary goods, are not taxed.<sup>4</sup> In March 2018, Communications Minister Nomvula Mokonyane, announced that the South African government is considering expanding the list of zero rated items but no details as to the possible items which may also be exempted in future, are currently available (R News, 2018).

The lack of sufficient sanitation and sanitary wear is not unique to South Africa. Many studies have proven that girls in Ethiopia (Tegegne & Sisay, 2014),<sup>5</sup> Kenya (African Population and Health Care Research Centre's Report, 2010), Nepal (Oster & Thornton, 2011), Cambodia (Sperling & Winthrop, 2016, p. 133),<sup>6</sup> and several other developing countries are absent from school during their menstruation period.<sup>7</sup> Girls who do not have access to sanitary pads, tampons or menstrual cups experience a great deal of anxiety, discomfort and embarrassment.

A pilot study in Kenya identified stigmatization of menstruation as a barrier to accessing information regarding menses. In Zimbabwe it was found that only 18 percent of women used conventional sanitary pads, whilst 45 percent indicated that they would use old clothes and rags to manage their period. Many girls stipulated the reasons for not using conventional sanitary pads were a lack of knowledge as to how to use them, the shame they experienced when purchasing pads from shops, and in particular due to high cost.<sup>8</sup> In addition to the fact that girls do not attend school due to a lack of sanitary wear, the problem is further exacerbated by the fact that many schools do not have private, working sanitation facilities (The South African Human Rights Commission, 2014, p. 57).<sup>9</sup>

This lack of facilities, as well as the lack of adequate sanitary supplies, seem to contribute to the absenteeism of many girls in schools when they feel there is no other option but to remain out of public eye during menstruation. The reality is that some girls may miss up to three months of school per year due to a physical fact unique to females. Because of the biological reality of their sex, as well as their socio-economic status, some girls face a level of discrimination that impacts upon many other of their fundamental rights. The lack of access to sanitary wear deters women from making decisions that shape the rest of their lives, such as effecting the choice of attending school and gaining access to education. As a result, when girls do not have access to sanitary wear, it is not merely one right that is infringed, but a plethora of rights.<sup>10</sup> This monthly biological event causes girls, and only girls, to suffer a violation of their rights to, *inter alia*, dignity, bodily integrity, health and education. Discrimination based on sex or any other status is explicitly forbidden in terms of Article 2 of the Convention on the Rights of the Child.<sup>11</sup>

## **A framework of rights**

### *The right to non-discrimination*

To discriminate means to treat differently, to distinguish or single out certain people because of certain characteristics which they possess.<sup>12</sup> In terms of Article 2 of the CRC and Article 3 of the African Charter on the Rights and Welfare of the Child,<sup>13</sup> State Parties must ensure and respect children's rights without discrimination of any kind. Phrased differently, the CRC and the ACRWC provide that Member States must guarantee that all the rights that all children have, are effected, without denying one group certain rights because this group experiences a monthly biological reality.

At para 20 of its General Comment No 20, the UN Committee on Economic, Social and Cultural Rights (CESCR) explains that “[n]on-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights.” (CESCR, 2009). In fact, discrimination is prohibited in terms of The Universal Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR); the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1971; the American Convention on Human Rights, 1969; and the African Charter on Human and Peoples' Rights, 1981. Another important instrument of international law, namely the Convention on the Elimination of Discrimination against Women,<sup>14</sup> at Article 1, describes "discrimination against women" as:

“[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human

rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

This treaty furthermore provides for the enactment of legislation that will eradicate discrimination against women, and in particular calls for the recognition of particular circumstances which only women may face in order to effect their right to equality.<sup>15</sup> In addition, it must be emphasised that one of the cornerstones of the South African democracy is the right to equality, enshrined in section 9 of the Constitution.<sup>16</sup> It provides that “[e]quality includes the full and equal enjoyment of all rights and freedoms”<sup>17</sup> and that no one, including the state, may “unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... sex”.<sup>18</sup> It also provides that, in order to “promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”. Therefore it is clear that the South African Constitution also enshrines the principle of substantive equality.<sup>19</sup>

Indeed, it has been accepted worldwide that the obligation not to discriminate is not a passive one (Committee on the Rights of the Child, 2013, p. 11) but that, in order to achieve equality, differences must be recognised and understood, in order to remove factors that may cause the dissimilar treatment of people. Substantive equality requires the elimination of barriers which exclude certain groups from participation in the workplace or, in the case of children, from school and other activities. The CESCR has explained that “[m]erely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2” (of the ICESCR) but that “discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations” (CESCR, 2009). This will require States

parties to adopt special measures, both on a permanent or semi-permanent basis, to diminish conditions that perpetuate discrimination.

In South Africa, the Constitutional Court has confirmed the importance of substantive equality on numerous occasions, rather notably in the decision of *President of the Republic of South Africa v Hugo* where O'Regan J explained it in the following way:

“[A]lthough the long term goal of our constitutional order is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality” (President of the Republic of South Africa v Hugo, 1997).

As a result, it must be realised that the equal treatment of people in different circumstances may perpetuate inequality. In certain circumstances, different or additional mechanisms may have to be put into place in order to create equality and justice. Therefore, the South African Constitutional Court has developed a transformative approach to substantive equality in terms of which one has to locate an understanding of disadvantages within systemic inequalities, develop new normative interpretations of equality and pragmatic remedies which will eradicate social and economic disadvantage which will, in the end established “real change” (Albertyn, 2007, p. 258).

Although Article 2 of the CRC does not explicitly promote substantive equality to the extent that some of the other legal documents mentioned above, do so, it is submitted that the provision of the CRC cannot be interpreted in any other way. The inference must be drawn that special and additional measures have to be introduced to ensure that all of the rights contained in the CRC are effectively implemented for all children. This may have the effect that additional services be provided to one vulnerable group, in order to eradicate the effect that biology has on the realisation of rights.

### *The right to social security*

In addition to the above, it is submitted that this interpretation is in line with Article 26 of the CRC which provides that measures of social security and social insurance must be used to achieve the full realization of children's rights. The CRC prescribes that the resources and circumstances of the child (as well as those persons responsible for the care of the child) be taken into account in considering an application for benefits made by or on behalf of the child.

### *The right to education*

In terms of Article 28 of the CRC, Article 11 of the ACRWC and section 29 of the South African Constitution, every child has the right to education. It is particularly important to note that in terms of Article 28(1)(e) of the CRC, Member States are obliged to “[t]ake measures to encourage regular attendance at schools and the reduction of drop-out rates”.<sup>20</sup> Article 11(1)(e) of the ACRWC places emphasis on the distinct needs of girls in that it requires Member States to “take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community”. In this respect, it is significant to note one of the statements made by the Committee on the Rights of the Child in its General Comment 1 of 2001: *The Aims of Education*. It reads as follows:

“Discrimination on the basis of any of the grounds listed in article 2 of the Convention, ... offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities. ... To take an extreme example, gender discrimination can be reinforced by practices such as a curriculum which is inconsistent with the principles of gender equality, by arrangements which limit the benefits girls can obtain from the educational opportunities offered, and by unsafe or unfriendly

environments which discourage girls' participation. ... All such discriminatory practices are in direct contradiction with the requirements in article 29 (1)(a) that education be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential" (Committee on the Rights of the Child, 2001).

Fifteen years later, the Committee on the Rights of the Child reiterated this imperative by expressing their concern at the inability of many Member States to keep girls in school beyond primary education (Committee on the Rights of the Child, 2016). The Committee once again called for investment in strategies and effective measures "that promote positive gender relations and social norms; ... including within schools; and ... the economic empowerment of women, to overcome the legal, political, cultural, economic and social barriers that represent barriers for girls" (Committee on the Rights of the Child, 2016). The Committee, in its General Comment, listed a number of contributing factors, which it observed contributes to the absenteeism of girls. This list includes "fees and associated costs; ... lack of adequate and safe sanitation facilities for girls; ... [and] environments not conducive to girls' inclusion and safety" (Committee on the Rights of the Child, 2016). Unfortunately, the Committee fails to specifically mention the effect which a lack of sanitary pads and tampons may have on girls.<sup>21</sup>

### *The right to health*

From the amount of international instruments that enshrine the right to health, it is clear that an explicit and shared normative framework exists in this regard.<sup>22</sup> One of the general comments by the Committee on Economic, Social and Cultural Rights (CESCR) explains that right to health does not merely refer to the right to not be sick, but rather that the right encompasses an array of socio-economic factors that are conducive to promoting a safe and healthy environment in which people can lead a healthy, sanitary and dignified life.<sup>23</sup> The right to health entitles

persons to a health care system that provides the enjoyment of a variety of facilities and goods.<sup>24</sup> Therefore, it may be deduced that a right to sanitary wear emanates from the right to health care, due to the detriments that arise to health in the absence of sufficient sanitary wear. The General Comment by the CESCR emphasises the special attention that must be given to children, especially young girls, in providing them with health care in the promotion of their physical and mental development.<sup>25</sup> It is also important to note that the CESR is of the view that one of the core obligations in terms of the ICESCR is that governments must ensure “the right of access to health facilities, goods and services on a *non-discriminatory* basis, especially for *vulnerable* or marginalized groups” (Committee on Economic, Social and Cultural Rights, 2000).<sup>26</sup>

In addition, the Committee on the Rights of the Child emphasises that the right to health should not be undermined as a result of discrimination, which is a factor that contributes to vulnerability (Committee on the Rights of the Child, 2013). In its General Comment on the implementation of the rights of the child during adolescence, the Committee makes reference to the importance of having access to “free, confidential, adolescent-responsive and non-discriminatory sexual and reproductive health services, information and education, available both online and in person, including on ... menstrual hygiene”, emphasising that “unequal access by adolescents to such information, commodities and services amounts to discrimination” (Committee on the Rights of the Child, 2016).

### *The right to dignity and bodily integrity*

Another immediate harm is due to the shame and indignation experienced by teenage girls in a school environment where many of their peers will ridicule and mock them, due to their own lack of knowledge about menstruation. As is evident from the above, the right to health, both

in its realisation, as well as a means of realising other human rights, is closely related to rights such as the right to dignity, the right to privacy, education and equality.<sup>27</sup> The right to dignity is a source of all other personal rights in the Bill of Rights of the South African Constitution and when this right is infringed, it cuts at the core of the founding constitutional principles (*S v Makwanyane*, 1995).

### *The best interests of the child*

Over and above these rights, Article 3 of the CRC provides that the best interests of the child shall be a primary consideration in all matters affecting children. The Committee on the Rights of the Child has explained that the concept of the best interests of the child is a multifaceted one existing as (a) a substantive right; (b) a fundamental, interpretative legal principle and; (c) as a rule of procedure (Committee on the Rights of the Child, 2013, p. 4). It has also stressed that at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines concerning children, due consideration must be given to their best interests (Committee on the Rights of the Child, 2013, p. 5). Such an assessment and determination of the best interests of the child require procedural guarantees. The justification for a decision must show that the right has been explicitly taken into account (Committee on the Rights of the Child, 2013, p. 4). This means that the child's best interests must be appropriately integrated and consistently applied in all implementation measures. Furthermore, it must be explained how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases (Committee on the Rights of the Child, 2013, p. 4).

## **Realising rights by recognizing difference**

South Africa ratified the CRC on 16 June 1995 and the ACRWC in 2000 (United Nations Human Rights Office of the High Commissioner, 2018). In terms of section 39(1)(b) of the Constitution, when interpreting the Bill of Rights of the Constitution, a court, forum or tribunal must take international law into account. As a result, provisions of, for example, the CRC and ACRWC<sup>28</sup> must be considered when giving effect to rights contained in the South African Constitution, including the rights to dignity, bodily integrity, health and education. Despite the fact that the South African government has promised to uphold, *inter alia*, Article 2 of the CRC in ensuring that all children, without discrimination based on the child's sex, are entitled to implementation of their rights, the State is not giving effect to the rights of girls by failing to provide sanitary health care products to girl children who cannot afford to buy it for themselves. As a result, it is submitted that the South African government is discriminating against girls by failing to take reasonable legislative and other measures to ensure that the rights set forth in the CRC are realised, and as a result failing in its international obligations. The State is failing to provide products to girls that will encourage their school attendance. In fact, the government is adding to the cost of such products, increasing its unavailability, by charging VAT for these monthly necessities but that are only used by one sex. If it is furthermore borne in mind that in June 2017 the National Department of Basic Education of South Africa introduced a policy of providing free condoms and HIV-testing at all schools but not for sanitary health care products, the level of discrimination is increased.<sup>29</sup> Whilst it is true that condoms and programmes of sex education may prevent pregnancies of school going girls, it is also a fact that all girls who have reached puberty menstruate on a monthly basis, while not all girls are sexually active.

One of the immediate health implications young girls will suffer when they do not have access to sanitary wear, is that, since they are still developing physically, they are more susceptible to

infections that may render them incapable of healthy physical development. Therefore, it is submitted that the South African government, by failing to provide indigent girls with sanitary health care products and facilities, is violating the right to health, enshrined in the Constitution in sections 27 and 28.

Section 27(1)(a) of the South African Constitution provides for the qualified right of access to health care whilst section 28(1)(c) grants all children the unqualified right to health care and social services. Section 27 provides that the state must take reasonable legislative and other measures to provide access to health care, “within its available resources” but s 28(1)(c) does not restrict a child’s right to basic health care services in this way. As a result, it may not hide behind an excuse of a lack of financial resources as to why sanitary health care products are not provided to school girls. The failure of the state to effect the socio-economic rights of adults due to limited resources and budgetary constraints may only be deemed justified if it can be proven to be reasonable (*Minister of Health v Treatment Action Campaign (2)*, 2002).<sup>30</sup> However, a higher standard of reasonableness exists in adjudicating state action regarding the socio-economic rights of children (Currie & De Waal, 2008, pp. 610-613). In *Minister of Health v Treatment Action Campaign (2)* it was found that the vulnerability of children in society necessitates greater consideration for the realisation of their socio-economic rights by the state.<sup>31</sup> The enforcement of children’s socio-economic rights require greater expediency in their implementation, as well as development of programmes to realise such rights, considering the pernicious nature of harm induced during childhood by a lack of socio-economic rights (Creamer, 2002, p. 17).

The detrimental effects of a lack of sanitary products not only manifest as violations of the child’s immediate well-being, but also has a detrimental impact on the child’s development and

future capacity for autonomy. The future implications are to be found in young girls' inability to attend school during menstruation, which places them in a far more vulnerable group as education being undertaken by adults is not necessarily of a primary or basic nature, resulting in disadvantages for both future education and employment. In the instance that the sex of a child and the bodily functions that accompany only that sex, are not catered for and it leads to an inability to attend school, it cannot be seen as anything but discrimination and a violation of a girl's right to education. In its statement provided above, the Committee on the Rights of the Child explained that any discrimination in relation to the right to education also violates one of the aims of education, contained in Article 29(1) of the CRC. Girls, who cannot afford to manage their menstrual cycles effectively, in this way, are also denied the opportunity to develop their personalities, talents and mental and physical abilities.

In South Africa, the right to basic education enshrined in the Constitution, is an unqualified right to which all persons are entitled to.<sup>32</sup> Moreover, the right to education has to take equity into account in order to be fulfilled.<sup>33</sup> In the South African National Gender Framework it is stipulated that in order for any policy regarding the education of women to be deemed effective in the promotion of gender equality, special consideration of the difficulties encountered by women in attending school should be taken into consideration (The Office on the Status of Women, 2000, pp. 5, 12). It can thus be said that the principle of substantive equality must also be effected in this sphere. Therefore, when women are granted access to education but without taking into account the factors that deter them from having the same learning experience as their male counterparts, it cannot be considered an equal fulfilment of the right to education.

Furthermore, it is submitted that the lack of access to sanitary wear limits girls' right to dignity and to be considered as worthy of respect and concern. It was described above that menstruation is the cause of much humiliation and stigmatisation. In many countries and cultures, menstrual blood and menstruating females are regarded to be dirty and impure.<sup>34</sup> As a result, girls and women are often embarrassed about menstruation, and adolescent girls attach negative connotations with puberty and growing up. It may also affect their self-esteem.<sup>35</sup> Even when girls do attend school, the stigma and shame associated with menstruation may also affect girls' well-being and performance in school. Girls may be worried about leakage, especially when using alternative sources as sanitary products, and this may affect girls' ability to concentrate and participate in the classroom.<sup>36</sup> Moreover, it must be borne in mind that due to the imbalance in power-relations in many communities, sanitary products are often considered an unnecessary expense at the policy, community, or household level, particularly when finances are limited and/or controlled by men (PATH, 2016, p. 3).<sup>37</sup> These discriminatory and degrading attitudes towards women and girls, due to stigmatization of a natural bodily function, violates their right to dignity and bodily integrity.

The South African government is failing to consider the best interests of girl children who cannot afford to buy the necessary products to manage their menstrual health care. It is discriminating against girls by ignoring the rights of girls to receive the same level of uninterrupted education as boys, to develop their personalities, talents and mental and physical abilities in the same way that boys are being developed. By ignoring the monthly reality which adolescent girls have to face, the State is disregarding the simple necessities that they require to live a life of dignity and self-worth. It is failing to implement laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines which consider the best interests of girl children who cannot afford to buy sanitary health care products. The

South African government has never explained why it chose to rather provide free condoms to schools, instead of sanitary health care products, and by failing to do so, the South African government has never explained how girl children's interests have been weighed against other considerations.

It is submitted that with respect to the provision of sanitary wear to girls who cannot afford to buy it themselves, it is definitely time that the executive and legislative arms of the South African government too need to understand these systemic inequalities and implement pragmatic remedies which will effect real change. There finally needs to be delivery on the number of promises made that indigent girls will be provided with sanitary health care products which will enable them to attend school. The first public notice given to the need for free sanitary pads, for poor women and girls, was in January 2011. The then president of South African, Jacob Zuma, at the Peter Mokaba Stadium in Polokwane, insisted that government would be promoting a campaign supporting free sanitary towels for poor women (Mathlala A. (Sowetan Live), 2011). A month later, during the State of the Nation address, president Zuma reiterated the government's concern for poor women and girls and stipulated that health rights of women should be broadened to include sanitary towels for the poor (Zuma, 2011). The only other glimmer of support was found in a speech by Buti Manamela, then Deputy Minister in the Presidency, at the launch of a non-government organisation, Dignity Dreams, in 2015 (Manamela, 2015). Unfortunately, little tangible change has been effected in promoting access to sanitary wear (Sefali, P (GroundUp), 2015). There has been no legislative or policy reform to guarantee sanitary health care products, and only one provincial department of education has introduced a measure of relief. In January 2017 the KwaZulu-Natal Department of Education launched a project for the provision of sanitary pads to indigent girl learners in selected quintile 1-4 schools in grade 4-12 (Staff Reporter (The Mail and Guardian), 2017). This project has

been praised and lauded for the initiative that explicitly “seeks to reduce the drop-out rate of girl learners, caused by missing out on school, due to not being able to afford sanitary pads” (Department of Education Kwa-Zulu Natal, 2017). It can only be hoped that the National Department of Education will soon follow with a nationwide policy that will also seek to remove the barriers that prevent substantive equality in South African schools. Apparently this wish will not be soon fulfilled, however, if the statement by the Western-Cape Education department, explaining that there “are no plans to roll out free sanitary pads for schoolgirls in the Western Cape” is to be believed (Thembo, 2017).

## **Conclusion**

Approximately every 28 days, most women and some girl children experience the shedding of the lining of their uterus (Chamberlain, 2017). For most of these females, this experience is uncomfortable and sometimes painful (Crosta, 2017). For a number of indigent women and girls, however, the experience is completely debilitating, often due to a lack of sanitary health care products and safe and clean sanitation services, and also due to social discriminatory attitudes and stigmatisation.

This chapter has shown that the lack of access to adequate sanitary wear affects not only girl children’s dignity and self-worth, but exacerbates the feminisation of poverty by infringing their right to education and health and negatively affects the realisation of gender equality. Article 2 of the CRC and other instruments of international law clearly require that governments ensure that all rights are effectively implemented without discrimination. In some instances, in order to eliminate conditions which perpetuate discrimination, special measures have to be adopted to achieve substantive equality. In the case of children, the obligation is even more urgent: children should be afforded special consideration, over and above adults in the realisation of

their rights, due to their vulnerability and dependence on adult care, and as children have limited capacity in identifying, realising and enforcing their socio-economic rights (Nolan, 2011, pp. 14-16). Girl children, who cannot afford sanitary wear, is afforded an unqualified right in terms of section 28(1)(c) of the South African Constitution. They have a direct and immediate claim upon the State for the fulfilment of their right to health care, which is not dependent on the progressive realisation of the State's ability within its means, as can be argued is the case for adult women. It is our argument that the South African government must treat girls differently but with the purpose to enable them to manage their menstrual health effectively and attend school. The State must provide girls, who cannot afford to do so themselves, with the monthly necessities which will empower them to develop to their full abilities, in the same way that boys are allowed to do.

## Notes

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<sup>1</sup> The SANHANES study explains further that 14.9% of males, but 9.2% of females earned R3 201 to R12 800 per month, whereas 5.2% of men and 2.2% of women's monthly income ranged between R12 801 to R51 200. A total of 32.5% of respondents reported no income. The reported source of income showed further disparity between sexes where more males (45.5%) as opposed to females (32.4%) received salaries and wages and where more females (27.4%) relied on pensions, grants and UIF than males (14.6%).

<sup>2</sup> Furthermore, the monthly child care grant in South Africa currently amounts to R400, whilst pensioners receive R1 690 and disability and care dependency grants stands at R1 600. 16.5 million people from a population of 51.8 million are recipients of social assistance grants.

<sup>3</sup> This chapter will not focus on the discriminatory nature of imposing "luxury taxes" on necessary items such as sanitary health care products that are only used by women. For an insightful contribution in this regard, see (Crawford & Spivack, 2017). \*\*\*\*\*USE OF BRACKETS AUTOMATIC DUE TO REFERENCING STYLE PROVIDED IN WORD\*\*\*\*\*

<sup>4</sup> These goods include brown bread, dried mealies and beans, lentils, tinned pilchards or sardinella, rice, fresh fruit and vegetables, vegetable oil, milk, eggs, and illuminating paraffin. (The South African Institute of Chartered Accountants, 2008).

<sup>5</sup> Ethiopian research indicated that in a pilot study of rural girls in Northeast Ethiopia 55.6% of girls used rags and underwear as soak ups, which they would wash and re-use. Many stipulated the reason for not using conventional sanitary pads was due to high cost, lack of knowledge how to use them and the shame they experienced purchasing them from shops.

<sup>6</sup> The authors explain that in Cambodia 31% of schools do not have a toilet on school grounds, suggesting that post pubescent girls must leave school in order to effectively manage their period. This information was gathered by (Connolly & Marni, 2013).

<sup>7</sup> See further studies referred to by (Sperling & Winthorp, 2016); and (Tamiru, et al., 2015), as cited by (PATH, 2016). Some studies, however, found that the provision of sanitary products does not necessarily cause an improvement in school attendance. See in this regard (Ackerman, 2015).

<sup>8</sup> In a pilot study done in 2015 in the rural Vhembe district in Limpopo, South Africa, girls were interviewed in respect of their practices surrounding their menstruation period. Only 37 percent of the girls stipulated that they used conventional sanitary pads and changed them twice a day, even though sanitary pads should be changed every four to eight hours to prevent infection (Ramathumba, 2015, p. 4). 55 percent of the girls admitted to using cloths

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and rags which they would wash, but due to embarrassment they felt because of stigmatization in their community, they would not hang these items outside to dry, but would rather hide them in their homes. Others would use hand towels filled with sand as a replacement for sanitary pads (Ramathumba, 2015, pp. 4-9). Some girls confessed to “recycling” tampons, sanitary pads and even nappies (Bernardo, 2016).

<sup>9</sup> The urgent need for sanitation facilities at certain schools was recently illustrated by the tragic deaths of two young children who drowned in pit toilets in the Eastern Cape. President Cyril Ramaphosa called upon the Department of Basic Education to address the dire situation as a matter of grave importance. (Etheridge, 2018).

<sup>10</sup> The notion of interdependence and indivisibility of all human rights is firmly established in international law. See, for example, Tobin, 2006, p 281 explaining how this guiding principle is derived from the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993. In (*Khosa v Minister of Social Development*, 2004) the Constitutional Court emphasised the interconnectedness of the rights in the Bill of Rights of the Constitution of the Republic of South Africa, 1996 and that in determining whether a right should be provided for, special consideration must be given to the impact on other rights.

<sup>11</sup> 1989, hereafter the CRC. Art 2 provides that “1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”

<sup>12</sup> See, for example, the definition of *discrimination* in The Oxford English Dictionary (<https://en.oxforddictionaries.com/definition/discrimination>).

<sup>13</sup> 1990, hereafter the ACRWC. Art 3 reads: “Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”

<sup>14</sup> 1979, hereafter the CEDAW.

<sup>15</sup> See in this regard, Arts 10, 11, 12 and 14 in particular.

<sup>16</sup> The Constitution of the Republic of South Africa, 1996, hereafter the Constitution.

<sup>17</sup> S 9(2) of the Constitution.

<sup>18</sup> S 9(3) provides that the “state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

<sup>19</sup> S 9(2) of the Constitution.

<sup>20</sup> A similar provision is found in Art 11(3)(d) of the ACRWC.

<sup>21</sup> The fact that the CRC has never specifically mentioned the effect which a lack of menstrual health care products has on the lives of children, also not in any of its Concluding Remarks – as to the knowledge and research of the authors – must also be bemoaned.

<sup>22</sup> These documents include the Universal Declaration of Human Rights of 1948 of which Art 25.1 provides that “[e]veryone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services”; the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) of 1966: Art 12.1 of the ICESCR recognises “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, while Art 12.2 provides a number of “steps to be taken by the States parties ... to achieve the full realization of this right”; Art 11.1 (f) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965; Art 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979; Art 11 of the European Social Charter of 1961; Art 16 of the African Charter on Human and Peoples’ Rights of 1981; Art 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988; Art 24 of the CRC of 1989, discussed below; Art 14 of the ACRWC of 1990, discussed below; and Art 25 of the Convention on the Rights of Persons with Disabilities of 2006.

<sup>23</sup> Para 4 of the General Comment (Committee on Economic, Social and Cultural Rights, 2000). See also (Office of the United Nations High Commissioner for Human Rights, 2008); and para 2 of the General Comment No 15 (2013) (Committee on the Rights of the Child, 2013) 4.

<sup>24</sup> Para 9 of the General Comment 14.

<sup>25</sup> At para 22.

<sup>26</sup> At para 43(a), own emphasis.

<sup>27</sup> See also para 3 of the CESCR General Comment 14. It is interesting to note that the CRC does not explicitly enshrine the child’s right to dignity or bodily integrity but refers to the dignity of the disabled child; those you are accused of, or found guilty of offences; and of child victims. On a strict reading of Art 2 of the CRC, requiring that the “rights set forth in the present Convention” be ensured on a non-discriminatory basis, the right to dignity and bodily integrity are not included in the rights to be respected in terms of Art 2.

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<sup>28</sup> 1990, hereafter the ACRWC. The ACRWC entered into force in November 1999 and South Africa ratified this convention on 7 January 2000.

<sup>29</sup> The department allocated R245 million towards the policy for the 2017 financial year (Hlatshaneni, S (The Citizen), 2017).

<sup>30</sup> It is submitted that even if girls' right to sanitary wear should be enforced as a qualified right, it is evident that the government's action regarding this cannot be deemed reasonable, as it has failed to realise this right by taking legislative and other measures, so as to achieve the progressive realisation of the right, within available resources.

<sup>31</sup> At para 68.

<sup>32</sup> S 29 reads: "(1) Everyone has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible. (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account- (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices. (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that- (a) do not discriminate on the basis of race; (b) are registered with the state; and (c) maintain standards that are not inferior to standards at comparable public educational institutions. (4) Subsection (3) does not preclude state subsidies for independent educational institutions."

<sup>33</sup> S 29(2)(a) of the Constitution.

<sup>34</sup> See Path, 2016, p 2 citing research conducted in Ethiopia, Uganda, South Sudan, Tanzania, Zimbabwe, India and Nepal.

<sup>35</sup> See Path, 2016, p 2 citing research conducted especially in Kenya, Tanzania, Ethiopia, Uganda, South Sudan and Zimbabwe.

<sup>36</sup> Studies in Kenya, for example, found that girls were unable to focus on their teacher because they were concerned about blood leaking on their clothes. They were also afraid of standing up to answer questions in case blood had seeped onto their uniforms (PATH, 2016, p. 5).

<sup>37</sup> It is submitted that this is clearly evident on a policy level since sanitary health care products are subject to tax, as discussed above.

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