

**A CASE FOR THE SOCIO-ECONOMIC RIGHTS OF CHILDREN WITH
DISABILITIES IN SOUTH AFRICA: PROTECTION OF THE RIGHT TO
BASIC EDUCATION AND THE RIGHT TO SOCIAL SERVICES**

By

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ABSTRACT

This dissertation focuses on the protection and promotion of the socio-economic rights of children with disabilities in South Africa. Socio-economic rights aim to ensure that material inequalities that are experienced by children with disabilities are addressed in a manner that acknowledges their dignity, freedom and equality. Particular attention is paid to the right to basic education and right to social services. The dissertation highlights how the protection and promotion of these rights has an impact on children with disabilities' physical and mental development.

An extensive desktop research investigated the manner in which obligations placed on the state are being implemented. Selected international and regional instruments, as well as the Constitution of the Republic of South Africa and relevant national legislation are examined in so far as they relate to the protection of children with disabilities. Thereafter, the implementation of these legally based obligations is discussed.

The findings from the research show the existence of clearly expressed obligations in international and regional law, as well as commendable national legal frameworks that protect and promote the right to basic education and right to social services for children with disabilities. Despite this, children with disabilities still experience a number of discriminatory barriers that hinder their access to basic education and social services.

The dissertation concludes that more needs to be done by way of state action to ensure better interpretation and implementation of international and regional law as well as national law. Recommendations are given in this regard. Interpretation and implementation should be strengthened to ensure that children with disabilities benefit fully from access to basic education and social services.

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Table of Contents

CHAPTER ONE: INTRODUCTION.....	1
1.1 BACKGROUND TO THE RESEARCH	1
1.1.1 Introduction.....	1
1.1.2 Disability and human rights.....	3
1.1.3 Terminology.....	4
1.1.4 Children with disabilities in South Africa	7
1.1.5 Prevalence of disability amongst children in South Africa.....	9
1.1.6 Socio-economic rights and children with disabilities	13
1.2 RESEARCH QUESTIONS	15
1.3 THE SIGNIFICANCE OF THE STUDY	17
1.4 RESEARCH METHODOLOGY	17
1.5 STRUCTURE OF THE DISSERTATION	18
1.6 LIMITATIONS OF THE STUDY	19
CHAPTER TWO: CONCEPTUALISING DISABILITY	21
2.1 INTRODUCTION.....	21
2.2 MODELS OF DISABILITY.....	21
2.2.1 The medical or individual model of disability.....	22
2.2.1.1 History and development of the medical/individual model of disability	23
2.2.1.2 The decline of the medical or individual model of disability	26
2.2.2 The social model of disability.....	26

2.2.2.1	Introduction to the model and background.....	27
2.2.2.2	The aim of the social model of disability	28
2.3	THE HUMAN RIGHTS APPROACH TO DISABILITY	29
2.3.1	General United Nations instruments and Regional African instruments focusing on children’s rights	30
2.3.1.1	The United Nations Convention on the Rights of the Child, 1990 ..	30
2.3.1.2	General Comment Number 9 on the Rights of Children with Disabilities	34
2.3.1.3	The African Charter on the Rights and Welfare of the Child, 1981.....	36
2.3.1.4	The United Nations Convention on the Rights of Persons with Disabilities, 2006	40
2.3.2	The Constitution of the Republic of South Africa, 1996	49
2.4	CONCLUSION	55
CHAPTER THREE: ACCESS TO BASIC EDUCATION FOR CHILDREN WITH DISABILITIES IN SOUTH AFRICA – INCLUSIVE RHETORIC OR EXCLUSIVE PRACTICES		57
3.1	INTRODUCTION.....	57
3.2	INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS	58
3.2.1	The United Nations Convention on the Rights of the Child, 1990.....	59
3.2.2	The African Charter on the Rights and Welfare of the Child, 1981	61
3.2.3	The United Nations Convention on the Rights of Persons with Disabilities, 2006.....	62

3.3	THE SOUTH AFRICAN CONSTITUTION AND NATIONAL LEGISLATION	65
3.3.1	The Constitution of the Republic of South Africa, 1996	65
3.3.2	The South African Schools Act 84 of 1996	69
3.3.3	The content of the right to “basic education”	72
3.4	INCLUSIVE “BASIC” EDUCATION IN SOUTH AFRICA AND APPLICABLE POLICY	75
3.4.1	Inclusive basic education	76
3.4.2	White Paper 6 and the implementation of inclusive basic education	78
3.5	A BIRD’S EYE VIEW OF THE IMPLEMENTATION OF WHITE PAPER 6 AND INCLUSIVE BASIC EDUCATION	81
3.5.1	The current implementation challenges affecting children with disabilities... ..	82
3.5.1.1	Availability	83
3.5.1.2	Accessibility	83
3.5.1.3	Acceptability	85
3.5.1.4	Adaptability	86
3.5.2	Jurisprudence arising from the right of children with disabilities to inclusive basic education	88
3.5.2.1	Western Cape Forum for Intellectual Disability v The Government of the Republic of South Africa 2011 (5) SA 87 (WCC)	88
3.6	RECOMMENDATIONS AND CONCLUSION.....	92
CHAPTER FOUR: A SOCIAL SERVICES FAILURE – ALTERNATIVE CARE FOR CHILDREN WITH EMOTIONAL AND BEHAVIOURAL DIFFICULTIES		94

4.1	INTRODUCTION.....	94
4.2	DEFINING SOCIAL SERVICES.....	95
4.3	INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS	97
4.3.1	The United Nations Convention on the Rights of the Child, 1990.....	98
4.3.2	The African Charter on the Rights and Welfare of the Child, 1981	103
4.3.3	The United Nations Convention on the Rights of Persons with Disabilities, 2006.....	106
4.4	THE SOUTH AFRICAN CONSTITUTION AND NATIONAL LEGISLATION.....	109
4.4.1	The Constitution of the Republic of South Africa, 1996	109
4.4.2	The Children’s Act 38 of 2005	112
4.5	THE RIGHT TO SOCIAL SERVICES FOR CHILDREN WITH EMOTIONAL AND BEHAVIOURAL DIFFICULTIES IN ALTERNATIVE CARE.....	118
4.5.1	Jurisprudence on the right to social services for children with emotional and behavioural difficulties in alternative care	120
4.5.2	Case studies on the failure to meet the social services needs of children with emotional and behavioural difficulties in alternative care	123
4.5.3	The feasibility of caring for and providing protection to children with emotional and behavioural difficulties in alternative care	126
4.5.3.1	Foster care	126
4.5.3.2	Child and Youth Care Centres	127
4.6	RECOMMENDATIONS AND CONCLUSION.....	129
	CHAPTER 5: CONCLUSION.....	131
5.1	INTRODUCTION.....	131

5.2	THE HUMAN RIGHTS APPROACH TO DISABILITY	132
5.3	ACCESS TO BASIC EDUCATION FOR CHILDREN WITH DISABILITIES.....	134
5.3.1	Children with disabilities’ access to basic education in South Africa ..	135
5.3.2	Challenges to children with disabilities’ access to basic education.....	136
5.4	THE RIGHT TO SOCIAL SERVICES FOR CHILDREN WITH EMOTIONAL AND BEHAVIOURAL DIFFICULTIES IN ALTERNATIVE CARE.....	138
5.4.1	Children with emotional and behavioural difficulties failed by the state.....	140
5.5	CONCLUSION	141
	BIBLIOGRAPHY.....	143
6.1	BOOKS	143
6.2	CHAPTERS IN BOOKS	144
6.3	JOURNAL ARTICLES.....	146
6.4	LEGISLATION.....	149
6.5	CASE LAW.....	149
6.6	POLICY DOCUMENTS.....	150
6.7	INTERNATIONAL INSTRUMENTS.....	150
6.8	GENERAL COMMENTS	151
6.9	REPORTS.....	151
6.10	THESIS.....	153
6.11	INTERNET SOURCES	154

ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CYCC	Child and Youth Care Centre
GHS	General Household Survey
INDS	(South African) Integrated National Disability Strategy
MEC	Member of the Executive Council
PER	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SAPL	Southern African Public Law
SIAS	National Strategy on Screening, Identification, Assessment and Support
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WHO	World Health Organisations

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND TO THE RESEARCH

1.1.1 Introduction

South African law pertaining to the rights of children has had an impressive development over the years with a number of major legal documents being enacted that aim to protect children, create child-centred legal guidelines and provide for the best interests of children.¹ The most important of these legal documents is the Constitution of the Republic of South Africa² which came into force on 4 February 1997.³

The Constitution contains a Bill of Rights that “...enshrines the rights of all people [in South Africa] and affirms the democratic values of human dignity, equality and freedom”.⁴ A number of the rights and freedoms set out in the Bill of Rights apply to children in the same manner as they apply to adults. The Bill of Rights also has a children’s rights clause that contains rights that apply to children specifically, in addition to the protections afforded to them in the rest of the Bill of Rights.⁵

South Africa has also ratified international and regional instruments such as the United Nations Convention on the Rights of the Child (the CRC)⁶ which was ratified on 16 June 1995⁷ and the African Charter on the Rights and Welfare of the Child (the ACRWC) on 7 January 2000.⁸ International instruments are vital in the protection of children’s rights as they affirm and are the basis for the protection

¹ These include the Children’s Act 38 of 2005; the Child Justice Act 75 of 2008; the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; the Schools Act 84 of 1996 and the Social Assistance Act 13 of 2004.

² The Constitution of the Republic of South Africa, 1996.

³ Currie I & de Waal J *The Bill of Rights Handbook* (2013) 7.

⁴ S 7 of the Constitution of the Republic of South Africa.

⁵ S 28 of the Constitution; Currie & De Waal (n 3 above) 599.

⁶ The United Nations Convention on the Rights of the Child, opened for signature 20 November 1989, by General Assembly Resolution 44/25 (entered into force 2 September 1990).

⁷ Boezaart T “The Children’s Act: A valuable tool in realising the rights of children with disabilities” (2011) 74 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 264 265.

⁸ The African Charter on the Rights and Welfare of the Child, adopted July 1990, OAU Doc.CAB/LEG/24.9/49 (entered into force 29 November 1999); Boezaart (n 7 above) 265.

provided in national law.⁹ South Africa also recently ratified the Convention on the Rights of Persons with Disabilities (the CRPD) on 30 November 2007.¹⁰ The CRPD expands on the provisions in the CRC relating to the rights and protection of children with disabilities.¹¹

In the light of the above developments in law this dissertation will aim to investigate how and whether these progressive developments are being implemented to protect children with disabilities in South Africa. Particular focus will be given to the socio-economic rights of children with disabilities, specifically the right to basic education as provided for in section 29¹² and the right to social services of children removed from the family environment as provided for in section 28(1)(c)¹³ read with section 28(1)(b)¹⁴ and section 28(1)(d)¹⁵ of the Constitution. The research questions will deal with whether children with disabilities have unhindered access to basic education and appropriate social services. The research questions will be provided later in this chapter.¹⁶

The research is carried out in the light of the fact that international instruments and national legislation “cannot, in and of themselves, change the lives of children. That requires planning and provisioning by government to ensure that children have access to the services that the law promises to them”.¹⁷ The goal will be to determine whether South Africa is successfully carrying out planning and provisioning in relation to basic education and social services for children with disabilities.

⁹ Mahery P “The United Nations Convention on the Rights of the Child: Maintaining its value in International and South African Child Law” in Boezaart T (ed) *Child Law in South Africa* (2009) 310; Viljoen F “The African Charter on the Rights and Welfare of the Child” in Boezaart (this note) 331-333.

¹⁰ Convention and Optional Protocol Signatures and Ratifications, opened for signature on 30 March 2007, by General Assembly Resolution A/RES/61/106 (entered into force 3 May 2008); date of South African ratification <https://www.un.org/disabilities/countries.asp?id=166> (accessed 09 March 2012).

¹¹ Boezaart T & Skelton A “From pillar to post: legal solutions for children with debilitating conduct disorder” in Grobbelaar-du Plessis I & van Reenen T (eds) *Aspects of Disability Law* (2011) 107 115.

¹² S 29 provides for the right to access to education for all in South Africa. The section provides for access to basic education as well as further education. It provides that everyone has the right to receive education in the official language or language of their choice and provides factors to be taken into account when language is being considered. The section also provides that everyone has the right to establish and maintain independent educational institutions that do not discriminate on the basis of race; that are registered with the state; and maintain standards not inferior to comparable public institutions.

¹³ S 28(1)(c) provides, inter alia, that every child has the right to receive social services.

¹⁴ S 28(1)(b) provides, inter alia, that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

¹⁵ S 28(1)(d) provides that every child has the right to be protected from maltreatment, neglect, abuse, or degradation.

¹⁶ See para 1.2 below.

¹⁷ Boezaart & Skelton (n 11 above) 107.

1.1.2 Disability and human rights

When one looks at the discourse in the field of disability, the three theoretical perspectives that come to the fore and influence the discourse are the medical model of disability, the social model of disability and the human rights perspective.¹⁸ It is the aim of this dissertation to put forward the argument that the human rights perspective, as influenced by the social model of disability, is the most appropriate lens through which persons with disabilities are recognised as human beings with rights that need to be respected, promoted and preserved.

The medical model sees persons with disabilities as having “deficiencies which must be diagnosed, treated and if possible, cured”.¹⁹ This is done by medical practitioners and rehabilitation specialists who essentially through their interventions (treatment and rehabilitation) provide persons with disabilities with alternatives to begging and draw them closer to “a standard of general normality”.²⁰ The social model of disability rejects the medical model and instead places its focus on the inability of society to eradicate environmental and social barriers, therefore excluding persons with disabilities from society.²¹ According to the social model of disability “a person with a disability is not necessarily disabled because of a condition inherent in the individual but because of the physical and social arrangements of the environment.”²²

The human rights model, as influenced by the social model, views persons with disabilities as people with their own inherent human dignity and who are on an equal footing with persons without disabilities.²³ Persons with disabilities deserve equal protection.²⁴ The main aim of the human rights perspective is to integrate and mainstream fundamental human rights into the process of the design, implementation and monitoring of legislation, policies, programmes and service

¹⁸ Combrinck H “The Hidden Ones: Children with Disabilities in Africa and the Right to Education” in Sloth-Nielsen J (ed) *Children’s Rights in Africa: A Legal Perspective* (2008) 300-302.

¹⁹ Bhabha F “Disability equality rights in South Africa: Concepts, interpretation and the transformation imperative” (2009) 25 *South African Journal on Human Rights (SAJHR)* 217 223.

²⁰ Grobbelaar-du Plessis I & van Reneen T “Introduction to aspects of disability law in Africa” in Grobbelaar-du Plessis & van Reneen (n 11 above) xxvi.

²¹ Grobbelaar-du Plessis & van Reneen (n 20 above) xxv.

²² *Ibid.*

²³ Grobbelaar-du Plessis & van Reneen (n 20 above) xxvi.

²⁴ *Ibid.*

delivery aimed at the protection and promotion of the rights and welfare of persons with disabilities.²⁵

1.1.3 Terminology

It is necessary to go into a discussion on the most appropriate terminology to be used when referring to persons with disabilities. This is done in light of the above conclusion that the human rights perspective is the most appropriate lens through which persons with disabilities should be viewed.

Language and terminology shape and influence attitudes and values of a community and society in a positive or negative manner.²⁶ Language and terminology can reinforce discriminatory values and attitudes and contribute to the segregation of particular groups of people or it can facilitate change and encourage new values, attitudes and social integration.²⁷

Negative terminology used in relation to persons with disabilities has the effect of stereotyping and discriminating against them as well as creating a culture of non-acceptance.²⁸ Negative terminology degrades and diminishes people with disabilities and promotes archaic beliefs that persons with disabilities are sick, disadvantaged, needy and not “like us”.²⁹

In order to ensure that persons with disabilities are treated in a respectful and decent manner, steps should be taken to promote acceptable terminology that recognises the inherent humanity and human rights of persons with disabilities.³⁰ Terminology used should not refer to persons with disabilities primarily by their impairment because:

²⁵ Tobin J “Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations” in Invernizzi A and Williams J (eds) *The Human Rights of Children: From Visions to Implementation* (2011) 66-68.

²⁶ Department of Social Development “White Paper on the Rights of Persons with Disabilities” (2015) 22; People with Disability Australia (PDWA) “Terminology used by PDWA” <http://www.pwd.org.au/student-section/terminology-used-by-pwda.html> (accessed 18 July 2015).

²⁷ van Staden AFA *strategy for the employment of persons with disabilities* PhD thesis, University of Pretoria, 2011 48.

²⁸ *Ibid.*

²⁹ Department of Social Development (n 26 above) 22; People with Disability Australia (PDWA) “Terminology used by PDWA” <http://www.pwd.org.au/student-section/terminology-used-by-pwda.html> (accessed 18 July 2015); INDEX ‘Disability-Friendly terminology’ <https://www.disabilityinfo.org/mnip/db/fsl/FactSheet.aspx?id=77> (accessed 18 July 2015).

³⁰ INDEX (n 29 above); van Staden (n 27 above) 48.

[p]eople with disabilities are not conditions or diseases. They are individual human beings ... a person is not an epileptic but rather a person who has epilepsy. First and foremost they are people. Only secondarily do they have one or more disabling conditions.³¹

Terminology must reflect the recognition that “disability” is a loss or limitation of opportunities to participate in society on an equal level with persons without disabilities due to social and environmental barriers.³² It must also recognise that impairment (an injury, illness or congenital condition that may result in the loss or alteration of physiological or psychological function) is part of the negative interaction but is, in and of itself, neither the cause of nor does it justify disability.³³ Terms such as physically challenged, deformed, deformity, crippled and birth defect are unacceptable as they cast disability in a negative manner, are offensive, dehumanising and cause stigma.³⁴ The preferred terminology would be, inter alia, persons with disabilities, children with disabilities and employees with disabilities.³⁵ Below is a table compiled by van Staden indicating further examples of unacceptable and preferred terminology:³⁶

³¹ “Disability Etiquette Handbook of the City of San Antonio” <http://www.sanantonio.gov/DAO/PublicationsandMaps/DisabilityEtiquetteHandbook.aspx#13028592-disabilities> (accessed 18 July 2015).

³² Northern Officers Group “Defining impairment and disability” <http://disability-studies.leeds.ac.uk/files/library/Northern-Officers-Group-defining-impairment-and-disability.pdf> (accessed 18 July 2015).

³³ *Ibid.*

³⁴ van Staden (n 27 above) 49.

³⁵ *Ibid.*

³⁶ van Staden (n 27 above) 49-50.



PREFERRED TERMINOLOGY	UNACCEPTABLE TERMINOLOGY	REASONS TO AVOID UN-ACCEPTABLE TERMINOLOGY
Disabilities, a general term used for functional limitations that interfere with a person's ability, for example to walk, hear or lift. It may refer to a physical, mental or sensory condition.	Handicap.	Handicap derives from the phrase "cap in hand", referring to a beggar.
	Suffers from.	Indicates ongoing pain and torment which is not accurate.
	Afflicted with.	Denotes a disease. A disability is not an affliction.
Persons who had a spinal cord injury, polio, a stroke, a person who has multiple sclerosis, etc.	Victim of.	Persons with disabilities do not like to be perceived as victims. It creates the impression that they are helpless.
Uses a wheelchair.	Wheelchair-bound. Confined to a wheelchair.	Wheelchairs are a convenient mode of transportation, not prisons. They are viewed as liberating. Bound/confined belies the fact that many persons with motor disabilities engage in activities without their wheelchairs like driving and sleeping.
Able-bodied. Persons without disabilities.	Normal. Whole.	"Healthy" when used to contrast with "disabled" implies that the person with a disability is unhealthy. Many persons with disabilities have excellent health.
Deaf (with a capital D). Deafness, hearing impaired. "Deafness" refers to a person who has a total loss of hearing. "Hearing impairment" refers to a person who has a partial loss of hearing within a range from slight to severe. "Hard of hearing" describes a hearing impaired person who communicates through speaking and speech-reading, and who usually has listening and hearing abilities adequate for ordinary telephone communication. Many hard of hearing individuals use a hearing aid.	Deaf-mute. Deaf and Dumb.	The inability to hear or speak does not indicate a level of intelligence.
Person with Down Syndrome.	Mongol. Mongoloid.	

In addition to the above, van Staden states that terminology such as mentally retarded, mentally challenged, insane, slow learner, learning disability, brain damaged, retarded, moron, imbecile and idiot are unacceptable.³⁷ Preferred terminology would be person with an intellectual disability; person with a psychiatric disability; and person who has a mental or developmental disability.³⁸

³⁷ van Staden (n 27 above) 51.

³⁸ *Ibid.*

1.1.4 Children with disabilities in South Africa

Disability is a concept that is often linked to exclusion, inequality and dependence.³⁹ This has resulted in children with disabilities often experiencing exclusion from mainstream society due to negative preconceived conceptions about them.⁴⁰ This exclusion is, in addition, due to a lack of (or extremely limited) access to important resources and services.⁴¹ It is recognised that this exclusion and lack of (or limited access to) resources and services often results in children with disabilities growing up to be disempowered adults.⁴²

Historically services that assisted persons with disabilities were distributed on the basis of race.⁴³ The apartheid government also refused to be a part of the international movement that recognised the rights of persons with disabilities equally without discrimination.⁴⁴ The post-apartheid political dispensation has, inter alia, introduced laws in South Africa that are meant to recognise and protect the rights of all people. This includes children with disabilities. Below is a brief discussion of the law in South Africa that applies to children in general and children with disabilities in particular.

As mentioned earlier,⁴⁵ the Constitution, which has a progressive Bill of Rights, aims to promote the fundamental rights of all and prevent their violation.⁴⁶ The Bill of Rights contains a children's rights clause, namely section 28, which applies to all children, including children with disabilities, and provides rights that protect children in addition to the rights set out in the rest of the Bill of Rights.⁴⁷ Of particular importance is section 28(2) which provides that "a child's best interests are of paramount importance in every matter concerning the child". This provision applies in all matters that children with disabilities are involved in and are affected by.

³⁹ The South African Law Commission "Discussion Paper 103: Review of the Child Care Act" (2002) 563; The Department of Social Development "Integrated National Strategy – The Right to Belong and Participate: Support Services to Children with Disabilities" (2009) 16.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Bhabha (n 19 above) 219.

⁴⁴ *Ibid.*

⁴⁵ See para 1.1.1 above and section 29 and 28(1) mentioned therein.

⁴⁶ Currie & De Waal (n 3 above) 7.

⁴⁷ Currie & De Waal (n 3 above) 600.

The Children's Act⁴⁸ which is the "primary legal framework for the realisation of every child's constitutional right"⁴⁹ states in section 2(h) that one of its objectives is to recognise the special needs that children with disabilities may have. It also provides in section 2(i) that the Children's Act aims to promote the development and well-being of children. Section 6 contains the general principles of the Children's Act and section 6(2)(d) protects children from unfair discrimination on any ground including disability.⁵⁰ Sections 6(2)(e) and (f) recognise on the one hand that children should be allowed to increase their potential and on the other hand that children are vulnerable and need to be protected.⁵¹ Section 6(2)(f) goes on to specifically provide that an enabling environment must be created to respond to the special needs of children with disabilities. Section 11 of the Children's Act is devoted to giving due consideration to the rights of children with disabilities and children with chronic illnesses.⁵²

South Africa's obligations are further found in international and regional instruments that it has ratified. The most important, for purposes of this dissertation, are the CRC, the ACRWC and the CRPD. The CRC and the ACRWC contain a number of provisions that aim to promote non-discrimination, equality and the recognition and protection of children's rights and wellbeing. The CRC sets out in article 2 that states have the obligation to respect the rights in the Convention and ensure that they are afforded to all children without discrimination of any kind, including discrimination because of disability.⁵³ The ACRWC focuses on the rights of children with disabilities in article 13. The CRPD "clarifies the obligations and legal duties of states to respect and ensure the equal enjoyment of all human rights by persons with disabilities".⁵⁴

The Constitution specifically states how international law should be applied. Section 39(1)(b) states that when the Bill of Rights is being interpreted, a court, tribunal or forum must consider international law. Section 233 states that when any legislation is being interpreted, every court must prefer a reasonable interpretation that is consistent with international law over an interpretation that is inconsistent with

⁴⁸ 38 of 2005.

⁴⁹ Boezaart (n 7 above) 271.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Para 4.3.2 below will discuss the section in a bit more detail.

⁵³ Article 2 of the CRC; Boezaart (n 7 above) 265.

⁵⁴ Article 13 of the CRPD; Boezaart (n 7 above) 268.

international law. Note that both section 39(1)(b) and 233 contain the word “must”, confirming the importance of international law.

This dissertation seeks to examine the abovementioned positive and progressive legal developments for children with disabilities. This will be done specifically in relation to the right of children with disabilities to receive basic education as set out in section 29 of the Constitution and the right to social services, when removed from the family environment, as set out in section 28(1)(c) of the Constitution. This discussion must occur in the light of the human rights perspective of disability.⁵⁵

1.1.5 Prevalence of disability amongst children in South Africa

In order for South Africa to realise the rights, including the socio-economic rights, of children with disabilities, reliable statistics on disability prevalence, patterns and levels must be collected.⁵⁶ This ensures that children with disabilities are provided with appropriate services where they are needed most and that progress of this is measured.⁵⁷ Development and implementation of current and future interventions to ensure, inter alia, equal education, social services, protection and other basic services, require statistical evidence to guide and support the provision of these interventions.⁵⁸ Article 31 of the CRPD places an obligation on signatory states to “collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the Convention”.⁵⁹

There is, however, a lack of adequate, reliable and recent data and information on the nature and prevalence of disability in South Africa.⁶⁰ The “Integrated National Disability Strategy” (INDS) acknowledges this and notes that this is because disability was, in the past, mainly a health and welfare issue.⁶¹ The INDS attributes this lack of adequate and reliable statistical information to the following:

⁵⁵ As explained in para 1.1.2 above.

⁵⁶ Statistics South Africa “Census 2011: Profile of persons with disabilities in South Africa” (2014) v.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Article 31 of the CRPD.

⁶⁰ Department of Women, Children and People with Disabilities “Baseline country report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities in South Africa” (2013) v.

⁶¹ Office of the President “White Paper: Integrated National Disability Strategy” (1997) 5 http://www.gov.za/sites/www.gov.za/files/disability_2.pdf (accessed 15 July 2015).

- There have over the years been different definitions of disability;
- Different survey technologies have been used to collect information;
- There have been negative traditional attitudes towards people with disabilities that make it difficult to obtain information;
- Poor service infrastructure for persons with disabilities in underdeveloped area; and
- High levels of violence have impeded the collection of data, affecting the overall picture.⁶²

Despite the above challenges there are available statistics that can be used to provide guidance on the prevalence of disability in South Africa, particularly amongst children with disabilities. Latest South African statistics are found in the 2001 national census, 2011 national census and the 2013 general household survey.⁶³

The national census has been said to be the most reliable source of national estimates on disability available, for the following reasons:

- The census covers the whole population in private and institutional settings and other sources only cover private households;
- The census is an official count of everyone in the country, therefore it is possible to glean information on disability prevalence rates for small sub-national geographical areas and detailed disaggregated data.⁶⁴

⁶² *Ibid.*

⁶³ Information and/or data on children with disabilities below the age of 5 years has not been included in any of the statistical reports due to problems experienced in differentiating real difficulties related to disability from developmental processes and levels of development. Statistics South Africa will however conduct further surveys focusing on children aged 0-5 years old to fill this gap in information. See Statistics South Africa “Statistical Release P0318: General household survey 2013” (2014) 30; Statistics South Africa (n 58 above) x.

⁶⁴ Department of Women, Children and People with Disabilities, Department of Social Development, The United Nations Children’s Fund “Children with Disabilities in South Africa: A situation analysis 2001-2011” (2012) 30. The averment that the national census is the most reliable sources was made in this report.

It should, however, be noted that questions asked in the 2001 national census dealt with restrictions in participation in life activities due to disability.⁶⁵ The 2011 census on the other hand is not consistent with the approach taken with the 2001 census, in 2011 disability was defined as “difficulties encountered in functioning due to body impairments or activity limitation, with or without assistive devices”.⁶⁶ This 2011 definition is not in line with the CRPD or the INDS.

The annual general household surveys also collect data on disability, however they are sample surveys and the data should therefore be treated with caution.⁶⁷

The 2011 national census based its questions, to determine prevalence of disability, on the definition of disability as “difficulties encountered in functioning due to body impairments or activity limitation, with or without assistive devices”.⁶⁸ Six functional domains were used as the basis for the census, namely sight, hearing, communication, remembering or concentration, walking and self-care.⁶⁹

The findings of the census revealed a national disability prevalence rate of 7,5 per cent, that is 2 870 130 people were found to be persons with disabilities nationally.⁷⁰ The data further provides that the disability prevalence rate for children aged between 5 to 9 years old is 10,8 per cent (447 843), 10 to 14 years old is 4,1 per cent (161 828) and between 15 to 19 years old is 2,6 per cent (108 738).⁷¹ This shows a higher prevalence rate amongst children aged between 5 to 9 years old. However, care should be exercised in the use of this data as it is not clear whether the children were “unable to do” and/or “having a lot of difficulty to perform certain functions” due to disability related reasons or as a result of their level of development.⁷²

⁶⁵ Department of Women, Children and People with Disabilities (n 64 above) 30.

⁶⁶ *Ibid.*

⁶⁷ Department of Women, Children and People with Disabilities (n 64 above) v.

⁶⁸ Department of Women, Children and People with Disabilities (n 64 above) vi. It should be noted that this definition focuses on the impairment of the person and the disability caused by interaction with society and the environment, this is therefore not in compliance with the CRPD.

⁶⁹ Statistics South Africa (n 56 above) v.

⁷⁰ Statistics South Africa (n 56 above) vii.

⁷¹ *Ibid.*

⁷² Statistics South Africa (n 63 above) 30.

The 2013 General Household Survey (GHS) used questions developed by the Washington Group⁷³ based on a rating given by an individual in a household of their ability level for a range of activities that include seeing, hearing, walking, climbing a flight of stairs, remembering and concentration, self-care and communication.⁷⁴ Individuals who indicated that they had some difficulty with, a lot of difficulty with or were unable to perform two or more of the activities were noted as persons with disabilities.⁷⁵

The 2013 GHS found that nationally 5,4 per cent of persons aged 5 years old and above were found to be persons with disabilities.⁷⁶ This is an increase compared to the 2011 GHS which indicated that 5,2 per cent of persons aged 5 years old and above were found to be persons with disabilities.⁷⁷

The 2001 census disability measurement was based on the following question: “Does (the person) have any *serious disability* (my emphasis) that prevents his/her full participation in life activities such as education, work [and] social life?”⁷⁸ People had to indicate whether they had sight limitations (blind/severe visual limitation); hearing limitations (deaf, profoundly hard of hearing); communication or speech impairments; intellectual or serious difficulties in learning and behavioural difficulties and/or psychological difficulties.⁷⁹ It is important to note that the census only contains data on persons with severe disabilities and not persons with mild to moderate disabilities.

This census revealed that approximately 2,3 million people of the total population were found to be persons with severe disabilities; this is an estimated 5 per cent of the national population.⁸⁰ The census data further indicated that approximately

⁷³ The Washington Group on statistics was formed by the United Nations Statistical Commission as a result of the recognition that statistical methodological work was necessary for the facilitation of comparison of information and data on disability cross-nationally www.cdc.gov/nchs/washington_group.htm (accessed 09 August 2015). The main aim of the group is to promote and coordinate international cooperation in the area of health statistics with a focus on providing disability measures suitable for use in censuses and national surveys unstats.un.org/unsd/methods/citygroup/washington.htm (accessed 09 August 2015).

⁷⁴ Statistic South Africa (n 63 above) 30.

⁷⁵ *Ibid.*

⁷⁶ Statistics South Africa (n 63 above) 31.

⁷⁷ Department of Women, Children and People with Disabilities (n 64 above) viii.

⁷⁸ Department of Women, Children and People with Disabilities (n 64 above) ix.

⁷⁹ *Ibid.*

⁸⁰ Department of Women, Children and People with Disabilities (n 64 above) ix.

436 123 children were found to be children with severe disabilities, that is almost 2,5 per cent of the total child population.⁸¹

Though the above data is useful in giving an indication of the prevalence of disability amongst children, there exist challenges that need to be dealt with in order for data to give a clearer picture going forward. Firstly, the 2011 national census, 2013 GHS and 2001 national census all made use of different questions to collect and collate data on prevalence of disability. This means data over the different periods cannot be compared. Secondly the GHS are based on sample surveys and therefore do not provide a complete picture of the national situation on the prevalence of disability. Lastly, the questions utilised in the census and GHS seem to focus on an individual's challenges as a result of their impairments and not the disability resultant from the interactions with a society and environment that is not inclusive.

1.1.6 Socio-economic rights and children with disabilities

Socio-economic rights recognise that “human rights and the basic social conditions in which people live are fundamentally interconnected”.⁸² The recognition and inclusion of socio-economic rights in the Constitution aims to ensure that material inequalities that exist are addressed so that people in disadvantaged social and economic circumstances are able to live lives that are characterised by dignity, freedom and equality.⁸³

Socio-economic rights place the obligation on states and other duty bearers to provide a “basic set of social goods”⁸⁴ which include the right of everyone to basic education, health care services, social security as well as sufficient food and water.⁸⁵ Children have additional socio-economic rights guaranteed to them and these include, inter alia, the right to social services as discussed earlier in this chapter.⁸⁶

⁸¹ Department of Women, Children and People with Disabilities (n 64 above) 31.

⁸² Brickhill J and Ferreira N “Socio-Economic Rights” in Currie and De Waal *The Bill of Rights Handbook* (2013) 564-565; Proudlock P “Children’s Socio-economic Rights” in Boezaart (n 9 above) 291.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ S 27 of the Constitution; S 29 of the Constitution; Proudlock (n 82 above) 291; Department of Social Development (n 26 above) 33; See para 1.1.1 above for a brief description of what is contained in section 29.

⁸⁶ S 28(1)(c) of the Constitution; See para 1.1.1 above for a short discussion of section 28(1) socio-economic rights.

Socio-economic rights have also been described as those rights that “deal with minimum conditions for welfare and wellbeing”.⁸⁷

The provisions that set out socio-economic rights of everyone in section 27 of the Constitution are characterised by the limitations that the state should take “reasonable legislative and other measures, within its *available resources* to achieve *progressive realisation* of the rights” (my emphasis added).⁸⁸ The section 28(1)(c) rights provided to children do not contain these limitations.⁸⁹ This has resulted in the widely recognised view and practice that children’s socio-economic rights should be of priority with children having direct access to them without delay.⁹⁰ This seems to be more of the case for children who have been placed in alternative care.⁹¹

The Constitutional Court has been reluctant to separate children’s socio-economic rights from those of their parents, particularly from the limitation found in everyone’s socio-economic rights.⁹² The Court has however “developed a jurisprudence that recognises the state’s obligation to progressively provide material assistance to families living in poverty, and that recognises children as a vulnerable group in need of priority attention within the state’s overall plan of progressive realisation”.⁹³

Socio-economic rights are especially important for children, including children with disabilities, due to the role that they play in children’s physical and mental development.⁹⁴ This dissertation will highlight the important role that is played by the right to basic education and the right to social services in the development of children with disabilities.

⁸⁷ Nolan A *Children’s Socio-Economic Rights, Democracy and the Courts* (2014) 21.

⁸⁸ S 27 of the Constitution; Proudlock (n 82 above) 292; Liebenberg S “The Interpretation of Socio-Economic Rights” in Woolman S and Bishop M *Constitutional Law of South Africa* (2014) 5; See Rosa S and Dutschke M “Child Rights at the Core: The use of International Law in South African Cases on Children’s Socio-Economic Rights” (2006) 22 *South African Journal on Human Rights (SAJHR)* 224 236-238 for brief a discussion on “maximum extent of available resources” and “progressive realisation” in international law.

⁸⁹ Liebenberg (n 88 above) 5.

⁹⁰ Proudlock (n 82 above) 292; Skelton A “Girls’ Socio-Economic Rights in South Africa” (2010) 26 *South African Journal on Human Rights (SAJHR)* 141 146; Liebenberg (n 88 above) 48-49.

⁹¹ Proudlock (n 82 above) 292.

⁹² See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*); *The Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703 (CC) (*TAC*); and *Khosa and Others v The Minister of Social Development and Others* 2004 (6) SA 505 (CC).

⁹³ Proudlock (n 82 above) 292; *Grootboom* para 70-79; *TAC* para 77-78.

⁹⁴ Rosa and Dutschke (n 88 above) 13.

1.2 RESEARCH QUESTIONS

The right to basic education and the right to social services are both socio-economic rights that aim to achieve equality for all through their realisation.⁹⁵ As discussed above, socio-economic rights as set out in the Bill of Rights go to the core of protecting and promoting people's basic needs and ensure that people are able to live dignified lives.⁹⁶

The Constitution provides for the realisation of socio-economic rights in two ways. Firstly, the state is placed with the responsibility of actively implementing these rights.⁹⁷ This is seen in the following sections:⁹⁸

- Section 2: “The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.
- Section 7(2): “The State must respect, protect, promote and fulfil the rights in the Bill of Rights”.
- A number of socio-economic rights in the Constitution state that steps need to be taken to give effect to them.⁹⁹ For example, section 27 provides that everyone has the right to have access to food, water and social security.¹⁰⁰

Secondly, the Constitution provides ways in which persons in South Africa can ensure the realisation and enforcement of their socio-economic rights and hold the state accountable.¹⁰¹ Through these ways “socio economic rights are ... translated into concrete legal entitlements that can be enforced against the state and society by the poor [and vulnerable] and otherwise marginalised people to ensure that appropriate attention is given to their plight”.¹⁰²

⁹⁵ Proudlock (n 82 above) 291; Woolman S *Constitutional Law of South Africa* (2011) 57-6 & 57-7.

⁹⁶ Proudlock (n 82 above) 291; Khoza S (ed) *Socio Economic Rights in South Africa: A resource book* (2007) 20.

⁹⁷ Brand D & Heyns C (eds) *Socio Economic Rights in South Africa* (2005) 2; Liebenberg (n 88 above) 6.

⁹⁸ *Ibid.*

⁹⁹ Brand & Heyns (n 97 above) 2.

¹⁰⁰ *Ibid.*

¹⁰¹ Brand & Heyns (n 97 above) 2.

¹⁰² *Ibid.*

The above practically applies to children with disabilities in that the state is duty bound to respect, protect, promote and fulfil their socio-economic rights. If the state fails to adequately implement and provide for these rights then children with disabilities and those acting in their interests can enforce their rights through avenues provided such as litigation and advocacy.

The research questions that arise are as follows:

- Children with disabilities, like all other children, have the right to receive basic education and enjoy this right without any form of exclusion or discrimination.¹⁰³ Do children with disabilities in South Africa have unhindered access to basic education? If not, in what ways are they being prevented from fully accessing basic education and what policy and implementation gaps need to be filled and to ensure better access to basic education?
- The right to social services is provided for in the Constitution for all children including children with disabilities. Section 28(1)(c) provides that every child has the right to social services, it must be read with section 28(1)(b) which provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.¹⁰⁴ It must also be read with section 28(1)(d), which states that children have the right to be protected from maltreatment, neglect, abuse or degradation.¹⁰⁵ If appropriate social services cannot be obtained by a child while they are in parental care or family care the child may be placed in alternative care where it is expected that they will receive the appropriate social services. This dissertation will deal with the following question: do children with disabilities, specifically children with emotional and behavioural difficulties, who have been removed from the family environment, receive appropriate social services and are they protected from maltreatment, neglect, abuse or degradation while in alternative care?

¹⁰³ Committee on the Rights of the Child, General Comment 9 “The rights of children with disabilities” (2006) para 62.

¹⁰⁴ This has been identified as a social service in Dutschke M “Defining children’s constitutional right to social services” *Children’s Institute Rights Brief* (2007) 11.

¹⁰⁵ *Ibid.*

1.3 THE SIGNIFICANCE OF THE STUDY

The dissertation examines the international instruments that South Africa has ratified and obligations placed on South Africa by the Constitution and these instruments. It also examines the Constitution and national legislation which make the obligations in international instruments a part of national law. The rights of children with disabilities will be the focus of the examination; particularly the right to basic education which is a socio-economic right as well as the right to social services. The right to basic education and the right to social services have been the focus of court cases that produced judgments in which the courts had to grapple with these rights and their implementation in relation to children with disabilities. This will be highlighted in the dissertation.¹⁰⁶

The dissertation investigates whether South Africa is adequately implementing the obligations placed on it and appropriately protecting and preserving the rights of children with disabilities. Focus will be given to the two identified areas of basic education and social services only. Recommendations will also be made on the ways in which these obligations can be implemented in a manner that better protects and preserves the rights of children with disabilities.

The main purpose of this dissertation is to play a role in encouraging meaningful discourse on the rights of children with disabilities and the current policies in place that are meant to assist children with disabilities to live their lives in a dignified manner.

1.4 RESEARCH METHODOLOGY

The methodology employed will consist of an extensive and analytical desktop study of legislation, case law, chapters in books, journal articles and reports. This will be done to determine and analyse the current state of South African law and its implementation in relation to children with disabilities. An analysis of the most important and applicable international law will be undertaken to provide a reliable benchmark.

¹⁰⁶ See para 3.4.2 and 4.4.1 for discussions on case law.

The comparative method of analysis of the current South African legal framework and international law will also be carried out. This will be done to identify and indicate deficiencies in the South African law relating to the provision and protection of the socio-economic rights of children with disabilities.

1.5 STRUCTURE OF THE DISSERTATION

The structure of the dissertation is set out below as the contents of each of the chapters are briefly explained. The chapters follow the classic approach, namely they start off with an introduction that sets out the critical issue or issues to be discussed and then end off with a reflection on the critical findings.¹⁰⁷

CHAPTER 1: INTRODUCTION

This chapter will provide an introduction, background to and framework of the dissertation. The chapter contains the research questions as well as the objectives of the research.

CHAPTER 2: CONCEPTUALISING DISABILITY

The theoretical discourse on disability will be the focus of this chapter. This will include a discussion on the two models of disability that were instrumental in the origin and evolution of the disability debate namely; the medical and social models. The human rights perspective of disability, as influenced by the social model, will then be discussed.

CHAPTER 3: ACCESS TO BASIC EDUCATION FOR CHILDREN WITH DISABILITIES IN SOUTH AFRICA - INCLUSIVE RHETORIC OR EXCLUSIVE PRACTICES

This chapter will deal with the education needs of children with disabilities in South Africa; what inclusive education is; how legislation and applicable policy provide for inclusive education needs; and if implementation is successful or needs to be improved.

¹⁰⁷ van Staden (n 27 above) 18.

CHAPTER 4: A SOCIAL SERVICES FAILURE - ALTERNATIVE CARE FOR CHILDREN WITH EMOTIONAL AND BEHAVIOURAL DIFFICULTIES

The right to social services for children is provided for in section 28(1)(c) of the Constitution which provides that every child has the right to social services. This dissertation will discuss the definition and importance of social services; why the right to access alternative care is considered a social service and what rights link to the appropriate fulfilment of this right; how children with emotional and behavioural difficulties' right to alternative care is being infringed and why it is important that more effort is made to ensure the fulfilment of this right and possible recommendations.

CHAPTER 5: CONCLUSION

This chapter will draw the discussions in the dissertation to a close. This will be done by providing a summary of the different chapters and linking the chapters to each other. The importance of fulfilling socio-economic rights of children with disabilities as set out in the discussions will be re-emphasised. The recommendations made throughout the dissertation will be summarised in this chapter. Lastly, the author's vision for the way forward for fulfilling the rights of children with disabilities in South Africa will be laid out.

1.6 LIMITATIONS OF THE STUDY

Children with disabilities in South Africa face many challenges and have to overcome a number of obstacles. This dissertation cannot deal with all of them, for purposes of dedicating room for concentrated discussions the decision was made to focus on the socio-economic rights of children with disabilities and narrow this down further to the discussion on the right to basic education and the right to social services.

The discussion on the right to social services will contain a broad description of the international, regional and national law applicable. It will then focus on the right of children with emotional and behavioural difficulties to social services when placed in alternative care. This is a group of children with disabilities that has been identified

as being particularly vulnerable to abuse and neglect especially when placed in alternative care.¹⁰⁸

¹⁰⁸ See para 4.5 below.

CHAPTER TWO: CONCEPTUALISING DISABILITY

2.1 INTRODUCTION

This chapter will aim to conceptualise disability through a discussion firstly on the two main theories or models of disability that have played a role in influencing the manner in which disability is viewed by society. The manner in which disability is viewed by society has a strong (positive or negative) influence on how persons with disabilities, including children, interact with their environments and their participation in communities and society.

The medical model of disability and the social model of disability will be discussed first. An argument will be made that the social model of disability is the most appropriate and inclusive model of the two.

The discussion will then delve into the human rights approach to disability as influenced by the social model. The human rights approach, as influenced by the social model, is advanced as the most appropriate approach to incorporate into law and policy. The human rights approach requires the recognition of persons with disabilities as people with fundamental rights and freedoms that must be protected.

2.2 MODELS OF DISABILITY

There exist two major models of disability in the world of policy, research and writing that embody two opposite approaches:¹ the medical or individual model of disability and the social model of disability. Internationally the medical model of disability was the dominant model influencing societal response to disability and influencing behaviour and legislation and/or policy formulation and implementation.² This was the position until the social model gradually came to be understood as the better and more inclusive model.³ The gradual shift of importance from the medical to the social model began with the introduction of and involvement of the United Nations and its

¹ Grobbelaar-du Plessis I & van Reneen T “Introduction to aspects of disability law in Africa” in Grobbelaar-du Plessis I & van Reneen T (eds) *Aspects of disability law in Africa* (2011) xxxiii.

² *Ibid.*

³ Grobbelaar-du Plessis & van Reneen (n 1 above) xxxiii.

international human rights systems and instruments as well as the work and activities of disability rights advocates.⁴

2.2.1 The medical or individual model of disability

The medical or individualistic model of disability focuses on an individual's inability to conform to a society's view of what is normal and therefore looks at disability as "an individual failing and a personal tragedy".⁵ This model caused the development of a premise that disability is something that must be cured or managed through the intervention of welfare institutions, civil society organisations, medical practitioners and rehabilitation specialists.⁶ This is done through the assessment, diagnosis and labelling of persons with disabilities.⁷ Areheart describes this manner of thinking in the following way:

[The medical model] ... presumes that a person's disability is a personal medical problem, requiring but an individualised medical solution; that people who have disabilities face no 'group' problem caused by society or that social policy should be used to ameliorate. The medical model views the physiological condition itself as the problem. In other words, the individual is the locus of disability.⁸

In terms of this model, persons with disabilities are "problematized" as people in need of clinical intervention and the disability as a "mere biological characteristic of the individual".⁹ They are further seen as dependant and as people to be pitied and helped.¹⁰ This causes an over reliance on social and welfare systems because persons with disabilities are disempowered and isolated from their communities; they are not able to fully and appropriately exercise their internationally recognised social, political and economic rights.¹¹

⁴ *Ibid.*

⁵ Barnes C & Mercer G *Exploring Disability: A Sociological Introduction* (2010) 1.

⁶ Grobbelaar-du Plessis & van Reneen (n 1 above) xxxiii; Office of the President "White Paper: Integrated National Disability Strategy" (1997) 5
http://www.gov.za/sites/www.gov.za/files/disability_2.pdf (accessed 17 October 2015).

⁷ Office of the President (n 6 above) 5.

⁸ Areheart BA "When Disability Isn't 'Just Right': The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma" (2008)83 *Indiana Law Journal* 181 185-186.

⁹ Grobbelaar-du Plessis & van Reneen (n 1 above) xxiv.

¹⁰ Office of the President (n 6 above) 5.

¹¹ Grobbelaar-du Plessis & van Reneen (n 1 above) xxiv.

The medical model essentially adopts an able-bodied view as the norm, with disability being excluded from the norm.¹² As a result, persons with disabilities experience a number of disempowering social exclusions, such as those listed below, as set out in the (South African) Integrated National Disability Strategy:

- Children with disabilities who cannot properly integrate into mainstream schools are sent to board at special schools and separated from their families and/or communities;
- The structure and design of buildings and other related structures do not allow for persons with disabilities to fully participate in society;
- Ordinary services are not designed and planned with the needs of persons with disabilities in mind; and
- Societal barriers result in persons with disabilities not being given the opportunity to interact with others as much as their peers that do not have disabilities.¹³

2.2.1.1 History and development of the medical/individual model of disability

The isolation and discrimination of persons with disabilities can be seen as early as ancient history, in a context of poverty, disease, infirmity, death and violence.¹⁴ People who were viewed as chronically deformed and disabled had to beg to survive or be supported by wealthy relatives.¹⁵ People who were perceived to have abnormalities were treated as not being worthy of consideration and lower than everyone else.¹⁶

Cultural and religious beliefs and values as well as economic circumstances are given as justification for the discriminatory attitudes.¹⁷ However, religious principles are diverse in their approaches towards persons with disabilities; from impairments and diseases being viewed as indications of the fact that they came about as a result of wrongdoing, un-cleanliness and ungodliness to urging people to provide

¹² Bhabha F “Disability equality rights in South Africa: Concepts, interpretation and the transformation imperative” (2009) 25 *South African Journal on Human Rights (SAJHR)* 217 223.

¹³ Office of the President (n 6 above) 13-14.

¹⁴ Barnes & Mercer (n 5 above) 15. It must be noted that the basis of the individualistic and negative response to impairment can be found to be originally entrenched in Western culture (see Grobbelaar-du Plessis & van Reneen (n 1 above) 12).

¹⁵ Barnes & Mercer (n 5 above) 15.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

assistance to the sick and those less well-off as well the prohibition of killing of newborns with impairments.¹⁸

Social stigma, isolation, ostracism and sometimes persecution were the standard reaction to persons with disabilities.¹⁹ However, persons with disabilities were still expected to be self-sufficient and, therefore, had to contribute to households and their local economies, resulting in a heavy reliance on charity and alms-giving.²⁰

The 18th century saw the rise of industrialisation and urbanisation in which agriculture and production of handicraft were replaced as the means by which economies were maintained and societies survived.²¹ Agricultural techniques, as well as related social organisation and commercialisation of agriculture, went through a transformation²² to accommodate the emphasis placed on manufacturing as the economic driver and society's means of maintaining the livelihood of the people.²³ For persons with disabilities industrialisation was a step backwards as the labour intensive system was driven by factory work in which complex tasks were carried out with machinery and did not leave room for self-determined methods of working that persons with disabilities relied on.²⁴

The result of the excluding system was an increased classification of persons with disabilities as sick and infirm, socially dependent and a social problem.²⁵ This resulted in the institutionalisation of persons with disabilities, a solution that was employed well into the 20th century.²⁶

As a result of the inevitable relationship between institutionalisation and the medical profession, which developed from the fact that state-legitimatised medical practitioners practiced in these institutions, a perception of disability developed that

¹⁸ *Ibid.*

¹⁹ Barnes & Mercer (n 5 above) 16.

²⁰ *Ibid.*

²¹ Jary D & Jary J (eds) *Collins internet-linked dictionary of sociology* (2000) 298; Barnes & Mercer (n 5 above) 16.

²² Jary & Jary (n 21 above) 11; Barnes & Mercer (n 5 above) 16. With the increase in population, improvements of diets and increasing urbanisation and later the decline in the working population focused on agriculture, agricultural advances lead to the increased production of food and crop production associated with the birth and growth of the industrialised society and deterioration of the agrarian society (see Jary & Jary (n 21 above) 11).

²³ *Ibid.*

²⁴ Barnes & Mercer (n 5 above) 17.

²⁵ *Ibid.*

²⁶ *Ibid.*

was driven by scientific medical knowledge.²⁷ The medical profession took the lead in determining what was to be considered “normal” and “abnormal”, sane and insane, healthy and sick.²⁸

The medical (or individual) model of disability was born from this in the late 19th century.²⁹ It focused on bodily abnormality, disorder or deficiency and how this caused functional limitation or disability.³⁰ Professional diagnosis, treatment and recovery options lay the foundations of the model, medical practitioners as well as other professionals such as physiotherapists, occupational therapists, psychologists and educationalists and others were all part of this process.³¹

During the mid-20th century attempts to define disability came to the fore and in 1980 the World Health Organisation (WHO) attempted to formulate a definition when it produced the International Classification of Impairment Disability and Handicap (ICIDH).³² This was the most influential international contribution and its aim was to elucidate concepts and terminology associated with disability and to encourage research and policy that was accurate and similar.³³ The ICIDH definition separated impairment, disability and handicap as seen below:

- Impairment: “any loss or abnormality of psychological, physiological or anatomical structure or function”;
- Disability: “any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being”; and
- Handicap: “a disadvantage for a given individual, resulting from an impairment or disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex, social and cultural factors) for that individual”.³⁴

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Barnes & Mercer (n 5 above) 18.

³⁰ *Ibid.*

³¹ Barnes & Mercer (n 5 above) 18-19.

³² Barnes & Mercer (n 5 above) 20; Barnes C “Understanding the social model of disability” in Watson N, Roulstone A & Thomas C (eds) *Routledge Handbook of Disability Studies* (2012)15.

³³ Barnes (n 32 above) 15.

³⁴ Barnes (n 32 above) 16; Grobbelaar-du Plessis & van Reneen (n 1 above) 20.

The definition captures the message promoted by the medical model of disability.³⁵ While the term “impairment” focuses on the external, on the parts of the body that do not function correctly, the term “disability” denotes the activities one cannot undertake because of the impairment.³⁶ The definition relies on a notion of normality which is based on individualistic medical definitions; this is done despite the fact that the notion of what is normal is influenced by historical, cultural and contextual influences.³⁷ Persons with impairments are placed in a position of dependency and reliance on professional, therapeutic and social support as a result of being viewed as being incapable to survive economically and socially without care.³⁸

2.2.1.2 The decline of the medical or individual model of disability

The late 1900s saw a growth in the resistance against the medical model of disability with Europe and America leading the resistance that challenged the social and economic exclusion of persons with disabilities.³⁹ They exposed the manner in which the medical model concentrated on the functional and other limitations of persons with disabilities and in effect caused their segregation and exclusion.⁴⁰ The resistance led to the formation of groups and/or movements such as the Independent Living Movement (ILM) in America and the Liberation Network of Disabled People and the Union of the Physically Impaired against Segregation (UPIAS) in the United Kingdom.⁴¹ These groups motivated for new ways of thinking and campaigned for the acceptance and implementation of the principles contained in the social model of disability.⁴²

2.2.2 The social model of disability

The social model of disability is in direct contrast to the medical model in that it sees society, and not the affected individual or the impairment, as being the problem and

³⁵ Barnes & Mercer (n 5 above) 20.

³⁶ *Ibid.*

³⁷ Barnes (n 32 above) 16.

³⁸ *Ibid.*

³⁹ Barnes & Mercer (n 5 above) 24-25. This is in contrast to the campaigns in Western Europe and Scandinavian countries that sought enhanced state welfare entitlements and service support.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.* See Barnes & Mercer (n 5 above) 25-29 for a detailed discussion on these groups/movements that is outside the scope of this dissertation. The discussion focuses on the ideologies of the groups/movements and how these ideologies resisted the medical model of disability and at the same time how they were lacking.

cause of the exclusions faced by persons with disabilities.⁴³ The limitations experienced by persons with disabilities are as a result of society's "inability to function inclusively of everyone".⁴⁴

2.2.2.1 Introduction to the model and background

Emphasis on the preference and application of this model has occurred mainly as a result of two parallel processes that sought to change the perceptions created by the medical model.⁴⁵ The two parallel processes involved efforts by the United Nations as well as disability activists.⁴⁶ The United Nations has through its efforts developed a comprehensive human rights system that was previously based on the medical model and through transformation over the last 30 years is now based on the social model of disability.⁴⁷

This transformation first began when the United Nations General Assembly in 1975, through the Declaration of the Rights of Disabled Persons, recognised the inherent dignity of all persons with disabilities.⁴⁸ This created the opportunity for persons with disabilities to no longer be seen as invalids but instead as people that have the right to be treated with dignity as a class and as individuals.⁴⁹

In 1981 the transformation to social model based thinking continued when the year was declared the International Year of Disabled Persons, by the United Nations.⁵⁰ This was followed by the World Programme of Action concerning Disabled Persons; thereafter, 1983-1992 was declared the International Decade of Disabled Persons during which states were encouraged to work towards the creation of policy aimed at realising equality for persons with disabilities at state level.⁵¹

All of these soft law⁵² interventions shed light on the importance of the impact of the social model of disability in creating:

⁴³ Bhabha (n 12 above) 223.

⁴⁴ *Ibid.*

⁴⁵ Grobbelaar-du Plessis & van Reneen (n 1 above) xxiii.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Bhabha (n 12 above) 227.

⁴⁹ Bhabha (n 12 above) 227-228.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

a more comprehensive vision of equality for people with disabilities ... [that integrated] political equality with economic and social development. [D]isability was defined as a function of the relationship between persons with disabilities and their environment.⁵³

It was during the same time that advocacy efforts were being carried out by disability rights advocates that contributed to the shift from the focus on the medical model to the social model.⁵⁴ The activism challenged the exclusion faced by persons with disabilities in the social and economic sectors of society.⁵⁵

2.2.2.2 The aim of the social model of disability

The social model views disability as a “social construct” that is, a person is not disabled because of a physical condition inherent in them, but because of the way in which the physical and social environment around them is arranged and/or structured.⁵⁶ The environment can be said to be made up of the physical aspects, people’s view of disability and how the social world is set up: societal norms, policies and systems in place to implement and monitor the policies.⁵⁷

According to this model there needs to not only be a change in the manner in which persons with disabilities are treated but also society’s notion of disability needs to change.⁵⁸ There needs to be a paradigm shift in how society constructs disability.⁵⁹

Bhabha points out that for this paradigm shift to occur the following needs to happen:

[W]hat is required is a reconstructed approach to disability equality which both meets the particular needs of people with disabilities to enable them to fit in to society, while at the same time deconstructing the barriers that create the need for accommodation in the first place. The move from mere inclusion/accommodation to equality in a comprehensive and transformative sense is to question the status quo that privileges certain abilities over others, and to scrutinise whether or not such privileging is necessary and justified.⁶⁰

⁵³ *Ibid.*

⁵⁴ Bhabha (n 12 above) 228.

⁵⁵ Barnes & Mercer (n 5 above) 29.

⁵⁶ Grobbelaar-du Plessis & van Reneen (n 1 above) xxv.

⁵⁷ Schneider M “Disability and the environment” in Watermeyer B, Swartz L, Lorenzo T, Schneider M and Priestly M *Disability and Social Change: A South African Agenda* (2006) 9.

⁵⁸ Grobbelaar-du Plessis & van Reneen (n 1 above) xxv.

⁵⁹ Office of the President (n 6 above) 4-5.

⁶⁰ Bhabha (n 12 above) 225.

It is submitted that from reading the above it can be said (or interpreted) that the aim of the model is to not only create an environment where people with disabilities do not feel excluded.⁶¹ The aim is to also actively challenge and transform the underlying system that brought about the exclusion.⁶²

It must be noted that the social model of disability does not deny the importance or value of medical, rehabilitative, educational or employment-based interventions.⁶³ The model instead points to the fact that these interventions on their own do not fully empower and further the rights and freedoms of people with disabilities as a class or as individuals.⁶⁴

2.3 THE HUMAN RIGHTS APPROACH TO DISABILITY

When it is acknowledged that disability arises from barriers created by disabling attitudes which limit a person's participation in society, a step further must be taken. Persons with disabilities must then insist on equal treatment and protection as well as respect for their human dignity.⁶⁵ It is through this stance that the human rights perspective of disability finds relevance.

The human rights approach rejects reactive and piecemeal policies and programmes created by political bureaucrats and service providers that view impairments as the reason for disability.⁶⁶ The human rights approach recognises that in order for attitudes to truly change and for disabling barriers to be dismantled, as required by the social model, there must be a recognition that "people with disabilities are not given their rights as a matter of charity or goodwill of others; [but that] they are entitled to them as equal members of society".⁶⁷

The recognition of the human rights of persons with disabilities automatically places on states the duty and responsibility to respect and enforce these rights and thereby enact laws and policies accordingly.⁶⁸ States must actively review, reform and

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Barnes & Mercer (n 5 above) 18.

⁶⁴ *Ibid.*

⁶⁵ Bickenbach JE "Disability Human Rights, Law and Policy" in Albrecht G, Seelman K & Bury M *Handbook of Disability Studies* (2001) 567; Grobbelaar-du Plessis and van Reneen (n 1 above) xxvi.

⁶⁶ Bickenbach (n 65 above) 565.

⁶⁷ *Ibid.*

⁶⁸ Grobbelaar-du Plessis & van Reneen (n 1 above) xxi.

develop national laws, policies and functions in an inclusive and integrated manner that has regard for the human rights of persons with disabilities.⁶⁹

The human rights of persons with disabilities, and all people in general, find expression in international and regional human rights instruments. This section discusses selected international and regional instruments in so far as they relate to the protection of the human rights, freedoms and wellbeing of children with disabilities. This will be done in order to determine what the internationally and regionally accepted benchmark is in protecting the rights of children with disabilities. The section will begin with a discussion on instruments that deal with the protection of children's rights in general, the CRC and the ACRWC, and determine how they can be applied to meet the needs of children with disabilities.

The discussion will then focus on the CRPD and lastly, there will be a brief contextual analysis of the Constitution of South Africa and how it encompasses the rights and freedoms set out in international law.

2.3.1 General United Nations instruments and Regional African instruments focusing on children's rights

This section will deal briefly with the CRC and the General Comment Number 9 of the United Nations Committee on the Rights of the Child which focuses on children with disabilities. The United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities will also be briefly discussed. The rules do not specifically deal with children but focus on persons with disabilities and therefore contain important principles applicable to children with disabilities. There will also be a discussion of the ACRWC and how it protects children with disabilities.

2.3.1.1 *The United Nations Convention on the Rights of the Child, 1990*

The CRC was developed with the aim to establish universally acceptable and applicable standards on the protection and advancement of children's rights.⁷⁰ The CRC contains civil and political rights as well as social, economic and cultural rights

⁶⁹ *Ibid.*

⁷⁰ Jones M & Marks LAB "Beyond the Convention on the Rights of the Child: The rights of children with disabilities in international law" (1997) 5 *The International Journal of Children's Rights* 177.

that are applicable to all children, including children with disabilities.⁷¹ The CRC is based on four general principles namely: non-discrimination; best interests of the child; the right to survival; and development and participation.⁷²

Article 2(1) of the CRC provides that states that are signatories to the Convention should not discriminate against children on a number of listed grounds which include disability.⁷³ This is seen to be representative of the United Nation's intention to provide for the protection of the rights and freedoms of children with disabilities.⁷⁴ This is due to the fact that it explicitly prohibits discrimination on the ground of disability and places the obligation on states parties to respect and ensure that the rights in the CRC are protected and promoted.⁷⁵ Therefore the general rights set out in the CRC apply to children with disabilities as they would to children without disabilities.⁷⁶

However, Jones and Marks argue that this is not sufficient to provide for equality for persons with disabilities, and therefore children with disabilities.⁷⁷ Jones and Marks argue that it is necessary to have a principle of inclusion to be applied alongside the principle of non-discrimination which is not done by the CRC.⁷⁸ This provision of the principle of inclusion alongside non-discrimination must be done to better ensure that persons with disabilities are treated with equal concern and respect through the removal of barriers to their participation in society and their communities.⁷⁹

The CRC also contains article 23 which is a provision dedicated to the protection of the rights of children with disabilities. Article 23(1) provides that states parties are to recognise that children with mental or physical disabilities "should enjoy a full and decent life, in conditions which ensure dignity, promotes self-reliance and facilitate [active] participation in the community".⁸⁰ Article 23(2) deals with the provision of special care to children with disabilities and provides that states parties must ensure

⁷¹ Jones & Marks (n 70 above) 177.

⁷² Combrinck H "The Hidden Ones: Children with Disabilities in Africa and the Right to Education" in Sloth-Nielsen J (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 307.

⁷³ Article 23(1) of the CRC; See Para 1.1.4 above.

⁷⁴ Jones & Marks (n 70 above) 183.

⁷⁵ Combrinck (n 72 above) 307.

⁷⁶ *Ibid.*

⁷⁷ Combrinck (n 72 above) 307.

⁷⁸ *Ibid.*

⁷⁹ Combrinck (n 72 above) 307.

⁸⁰ Article 23(1) of the CRC.

that children receive this special care.⁸¹ However, this is subject to certain conditions which include the availability of resources, the eligibility of the child and his or her caregivers, the caregiver or parent must apply for the assistance, the assistance needs to be appropriate to the child's condition and circumstances of the caregiver or parent of the child.⁸²

Article 23(3) recognises the special needs of children with disabilities set out in article 23(2) and requires that the assistance provided be free of charge and must be designed to ensure that the children affected have effective access to and receive services such as education, training, health care and rehabilitation.⁸³ Such services must be provided in a manner that is conducive to children with disabilities achieving the fullest possible social integration and individual development.⁸⁴ This is also subject to the conditions that the services are provided free of charge whenever possible taking into account the financial resources of the parents or caregivers of the children.⁸⁵ The final provision is article 23(4) which aims to ensure that states parties, through a process of co-operative information sharing, improve their capabilities and skills and widen their experiences in areas such as the medical, psychological and functional treatment of children with disabilities.⁸⁶

Article 23 is ground breaking in the sense that it is a provision that specifically focuses on children with disabilities that is contained in the only United Nations instrument primarily dealing with the rights of children.⁸⁷ However, article 23 has also been the subject of criticism, such as the fact that it has a strong focus on welfare based mechanisms to assist children with disabilities instead of a rights focus that requires an inclusive social policy.⁸⁸ Jones and Marks argue that this makes the article susceptible to an interpretation that promotes welfare based responses to children with disabilities rather than rights based ones.⁸⁹ This is made worse by the fact that the economic and social rights in the provision are not guaranteed but

⁸¹ Article 23(2) of the CRC.

⁸² Article 23(2) of the CRC; Combrinck (n 72 above) 305.

⁸³ Article 23(3) of the CRC; Combrinck (n 72 above) 306.

⁸⁴ *Ibid.*

⁸⁵ Article 23(3) of the CRC.

⁸⁶ Article 23(4) of the CRC; Combrinck (n 72 above) 307.

⁸⁷ Jones & Marks (n 70 above) 181.

⁸⁸ Jones & Marks (n 70 above) 184.

⁸⁹ *Ibid.*

subject to conditions based on eligibility criteria, availability of resources and the application for assistance.⁹⁰

Combrinck also highlights concerns and criticism on the conditions placed on the access to the rights set out in the article.⁹¹ These are namely, the fact that children with disabilities have no unconditional right to assistance but that the rights are subject to qualifications and limitations.⁹² This has resulted in the opinion that in addition to article 23 other provisions in the CRC would be more useful in protecting the rights of children with disabilities.⁹³ This would include the provisions relating to, inter alia, non-discrimination (article 2), the best interests of the child (article 3), access to education (article 28) and an adequate standard of living (article 27). It is also proposed that because of its limitations article 23 should be considered in the context of the four general principles underpinning the CRC, namely non-discrimination, best interests of the child, the right to survival and development and participation.⁹⁴

Jones and Marks take matters a step further and propose that the CRC be interpreted in the light of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.⁹⁵ The Rules are based upon two essential ideas on disability; first of which is “equalisation of opportunities” which encourages various systems of society and environments to be made available to all, which includes services, activities, information and documentation.⁹⁶ The second idea is the “right to integration” which recognises the fact that persons with disabilities are members of society with the right to be a part of their local community and receive the support they need “within the ordinary structures of education, health, employment and social services”.⁹⁷

⁹⁰ Jones & Marks (n 70 above) 184; Kilkelly U “Disability and children: The Convention on the Rights of the Child (CRC)” in Quinn G & Degener T *The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 193.

⁹¹ Combrinck (n 72 above) 307.

⁹² Combrinck (n 72 above) 307; Boezaart T & Skelton A “From pillar to post: legal solutions for children with debilitating conduct disorder” in Grobbelaar-du Plessis I and van Reenen T (eds) *Aspects of Disability Law* (2011) 113.

⁹³ *Ibid.*

⁹⁴ Combrinck (n 72 above) 307.

⁹⁵ Jones & Marks (n 70 above) 183.

⁹⁶ Jones & Marks (n 70 above) 185.

⁹⁷ *Ibid.*

The Rules consist of 3 sections: The first section is on “preconditions for equal participation” and deals with the support that needs to be provided for persons with disabilities to reduce functional limitations and increase independence.⁹⁸ The second section sets out target areas that should be tackled to facilitate equal participation such as addressing physical access, education, employment, social security, family life and personal integrity, and sports and recreation.⁹⁹ Lastly, the Rules discuss implementation measures such as information and research.¹⁰⁰ States have the responsibility to collect and disseminate information on the living conditions of persons with disabilities and to encourage comprehensive research on all aspects affecting the lives of persons with disabilities; policy making and planning that is inclusive of disability; legislation that enables persons with disabilities to exercise their internationally recognised rights and freedoms on an equal basis with all persons; and economic policies that create equal opportunities for persons with disabilities and other implementation measures.¹⁰¹

Jones and Marks argue that the implementation of a combination of the Rules, which make it clear that the rights of persons with disabilities will be achieved through a policy of inclusion and the CRC will adequately enforce the rights of children with disabilities.¹⁰²

2.3.1.2 General Comment Number 9 on the Rights of Children with Disabilities

The Committee on the Rights of the Child, the monitoring body created by the CRC, published General Comment 9 on the Rights of Children with Disabilities on 27 February 2007.¹⁰³ This General Comment was developed in response to children with disabilities experiencing serious difficulties and barriers preventing full enjoyment of their rights contained in the CRC.¹⁰⁴ The Committee notes that the barriers faced are as a result of a combination of social, cultural, attitudinal and

⁹⁸ Rules 1-4 of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, 1993 (the Standard Rules); Jones & Marks (n 70 above) 185.

⁹⁹ Rules 5-12 of the Standard Rules (n 98 above); Jones & Marks (n 70 above) 185.

¹⁰⁰ Rules 13-22 of the Standard Rules (n 98 above); Jones & Marks (n 70 above) 185.

¹⁰¹ *Ibid.*

¹⁰² Jones & Marks (n 70 above) 186.

¹⁰³ The Committee on the Rights of the Child “General Comment 9: The rights of children with disabilities” (2006) para 1 (General Comment 9).

¹⁰⁴ General Comment 9 (n 103 above) para 5.

physical obstacles.¹⁰⁵ Therefore, the aim of the General Comment is to guide and assist states parties as they implement the rights of children with disabilities in a manner that covers all the provisions in the CRC.¹⁰⁶ Broad observations will be made about the content of the General Comment.

The General Comment confirms that article 23(1) of the CRC is the leading implementation provision of the CRC on children with disabilities.¹⁰⁷ It notes that article 23(1) recognises that children with disabilities should be included in society and implementation of the CRC should expressly aim for such inclusion.¹⁰⁸

The General Comment then discusses general measures of implementation. It points out that in addition to creating legislative measures addressing non-discrimination, states parties are encouraged to carry out comprehensive reviews of national laws and regulations.¹⁰⁹ These reviews should be done to ensure that provisions are applicable to children with disabilities who should, where appropriate, be mentioned explicitly.¹¹⁰ States should, in their laws and regulations, clearly and explicitly protect and promote the exercise of the rights of children with disabilities in their jurisdictions.¹¹¹

The General Comment thereafter discusses the need for the development of national plans of action and policies and the collection of data and statistics on the situation of children with disabilities.¹¹² The collection of data and statistics is a task that is often overlooked despite the fact that it has an impact on the determination of the type and extent of measures to be taken in terms of prevention and distribution of resources; as well as the allocation of budget and other allocations.¹¹³ The General Comment also goes into a bit more detail on the application of the different provisions and principles of the CRC in the interests of children with disabilities.¹¹⁴

¹⁰⁵ *Ibid.*

¹⁰⁶ General Comment 9 (n 103 above) para 6.

¹⁰⁷ General Comment 9 (n 103 above) para 17; Combrinck (n 72 above) 308.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² General Comment 9 (n 103 above) para 17-80.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

It has been advanced that the application of the general principles and rights, in the manner encouraged and clarified by the General Comment, could ameliorate the fears expressed by commentators on the perceived inadequacies of the CRC.¹¹⁵

2.3.1.3 The African Charter on the Rights and Welfare of the Child, 1981

The ACRWC was adopted in 1981 by the Organisation of African Unity (now the African Union) to address contextual problems that children in Africa face that are uniquely African problems.¹¹⁶ The ACRWC came about as a result of a frustration felt with the United Nations drafting process of the CRC at which African states were not adequately represented.¹¹⁷ Frustration was also felt when, in order to reach consensus between states with different backgrounds and contexts, some potentially divisive and emotive issues were left out of and not dealt with by the CRC.¹¹⁸ Dissatisfaction was experienced by African states due to issues and challenges unique to Africa not being sufficiently addressed because of the need for compromise to be reached amongst states.¹¹⁹

The reason for the birth of the ACRWC has been described in the following manner by Viljoen: "...each region, with its unique culture, traditions and history, is best placed to handle and resolve its own human situation".¹²⁰ The ACRWC ensures that the contextual protection needs of African children are met and the value of such an instrument is acknowledged by the United Nations General Assembly.¹²¹ What follows is a brief discussion of the ACRWC and the provisions and principles contained therein, with some comparisons to the CRC.

A perusal of the ACRWC reveals, firstly, that the wording is very similar to that of the CRC.¹²² This makes the differences between the two instruments very obvious as

¹¹⁵ Combrinck (n 72 above) 308.

¹¹⁶ Viljoen F "Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" (1998) 31 *Comparative and International Law Journal of South Africa* 199 205.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Viljoen (n 116 above) 205.

¹²⁰ Viljoen (n 116 above) 205-206.

¹²¹ Lloyd A "A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child" (2002) 1 *African Human Rights Law Journal* 11 13-14.

¹²² Gose M *The African Charter on the Rights and Welfare of the Child* (2002) 89.

will be seen in the discussion that follows.¹²³ The Preamble of the ACRWC begins by, *inter alia*, noting that the situation of the African child remains critical due to factors unique to the continent such as the socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflict as well as exploitation and hunger.¹²⁴ The Preamble goes on to recognise that children occupy a unique and privileged position in the African context and that the promotion and protection of their rights and wellbeing requires compliance and performance of duties contained in the ACRWC by everyone.¹²⁵ The ACRWC is based upon four principles, which are similar to the CRC, namely, non-discrimination, the best interests of the child, the right to survival and development and the right of the child to participate in matters concerning his or her well-being.¹²⁶

Article 3 of the ACRWC is the non-discrimination clause and provides that:

Every child shall be entitled to the enjoyment of the rights and freedoms recognised 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.¹²⁷

It is interesting and equally disappointing that the article does not include disability as a prohibited ground of discrimination as is done in the CRC in article 2(1).¹²⁸ This does not mean that children with disabilities can be discriminated against as the article applies to "every child". The ACRWC does, however, miss the opportunity to reaffirm the importance of the recognition, proper application and implementation of the rights and freedoms of children with disabilities.¹²⁹

Article 13(1) of the ACRWC affords children with disabilities the right to special measures of protection to meet their physical and moral needs.¹³⁰ This must be done under conditions that respect their dignity, promote self-reliance and active

¹²³ *Ibid.*

¹²⁴ Preamble to the ACRWC; Lloyd (n 121 above) 15.

¹²⁵ *Ibid.*

¹²⁶ Gose (n 122 above) 17. It is interesting to note that Lloyd identifies three pillars, namely, the evolving capacity of the child, the best interests of the child and non-discrimination (See Lloyd n 121 above) 17).

¹²⁷ Article 3 of the ACRWC.

¹²⁸ Combrinck (n 72 above) 310.

¹²⁹ *Ibid.*

¹³⁰ Article 13(1) of the ACRWC.

participation in their communities.¹³¹ This article can be compared to article 23(1) of the CRC and it is noted that while the ACRWC provides that children with disabilities “shall have the right to special measures of protection” the CRC provides that children with disabilities “should enjoy a full and decent life”.¹³² The CRC is very broad and unspecific while the ACRWC promotes a specific right and gives clear instruction on its application.¹³³

Article 13(2) of the ACRWC sets out the special measures that states must undertake in order to comply with article 13(1).¹³⁴ Article 23(2) of the CRC does the same thing, but has more detail than the ACRWC and spells out more specific rights.¹³⁵ The CRC recognises that children with disabilities have the right to special care and the ACRWC does not provide for this.¹³⁶

Furthermore the ACRWC and the CRC both make the assistance to be provided subject to available resources.¹³⁷ This is one instance, in this article, in which the ACRWC is fashioned in a broader manner than the CRC because unlike the CRC, the ACRWC does not make the circumstances of the parents or caregivers of the child a factor to be taken into account when assistance is being sought for children with disabilities.¹³⁸ The ACRWC only requires that the circumstance of the child’s special situation be taken into account; this could result in the extension of state assistance to a wider group of children than the CRC.¹³⁹ This group could include children whose parents’ or caregivers’ circumstances would allow them to care for the child without state assistance; the CRC only looks at the circumstances of the parents or caregivers of the child.¹⁴⁰

The list of services to be provided through state assistance in the ACRWC does not include education, health care services and rehabilitation as opposed to the CRC

¹³¹ *Ibid.*

¹³² Article 13(1) of the ACRWC; art 23(1) of the CRC; Gose (n 122 above) 89.

¹³³ Gose (n 122 above) 89; Mezmur BD “The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?” (2008) 23 *Southern Africa Public Law (SAPL)* 1 9 & 14.

¹³⁴ Gose (n 122 above) 90.

¹³⁵ *Ibid.*

¹³⁶ Article 13(2) of the ACRWC; art 23(2) of the CRC; Gose (n 122 above) 90.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Article 13(2) of the ACRWC; art 23(2) of the CRC; Gose (n 122 above) 90.

¹⁴⁰ *Ibid.*

which provides for these services in article 23(3).¹⁴¹ The omission of these services in the ACRWC is regrettable given their special importance for children with disabilities,¹⁴² particularly in the African context where it is necessary to ensure that the limited resources available are allocated to meeting the needs of these children.

Article 13(3) of the ACRWC is a provision, with a similar provision not contained in the CRC that places responsibility on states to guarantee mobility of children with disabilities, through the use of available resources.¹⁴³ This should be done by progressively ensuring that children with disabilities have access to buildings and other places where they may legitimately want access to.¹⁴⁴

Unlike the ACRWC, article 23(4) of the CRC makes provision for states parties to exchange information on preventative health care as well as medical, psychological and functional treatment of children.¹⁴⁵ The article also provides for the dissemination of and access to information on methods of rehabilitation, education and vocational services to children with disabilities. This is to ensure that states improve their abilities and skills in these areas.¹⁴⁶ The ACRWC has no such provision.¹⁴⁷ Gose poses the question whether African countries did this because they believed that they could not provide any information of value.¹⁴⁸ He concludes that this is a highly improbable assumption and the reason for the omission of such a provision will remain unknown.¹⁴⁹

Even though the ACRWC and the CRC have necessary and significant differences in the manner that they approach the protection of the rights and well-being of children with disabilities, they also have many important similarities. It is submitted that both instruments make one thing abundantly clear, namely that discrimination and exclusion of children with disabilities is expressly prohibited and states have the responsibility to ensure that discrimination and exclusion are no longer the lived

¹⁴¹ Article 13(2) and (3) of the ACRWC; art 23(3) of the CRC; Gose (n 122 above) 91.

¹⁴² Gose (n 122 above) 91.

¹⁴³ Article 13(3) of the ACRWC; Gose (n 122 above) 92.

¹⁴⁴ *Ibid.* For a discussion on what “legitimately” may mean see Gose (n 122 above) 92-93.

¹⁴⁵ Article 23(4); Gose (n 122 above) 93.

¹⁴⁶ *Ibid.*

¹⁴⁷ Gose (n 122 above) 93.

¹⁴⁸ *Ibid.*

¹⁴⁹ Gose (n 122 above) 93; Mezmur (n 133 above) 6-7. Mezmur discusses the lack of academic interest and outputs, particularly from African academics, on the ACRWC as compared to the CRC.

experiences of children with disabilities.¹⁵⁰ What follows is a discussion of the United Nations Convention of the Rights of Persons with Disabilities and how this expands on and develops the rights and freedoms of children with disabilities.

2.3.1.4 The United Nations Convention on the Rights of Persons with Disabilities, 2006

The CRPD was adopted by the United Nations General Assembly on 13 December 2006.¹⁵¹ South Africa ratified the Convention (and its optional protocol) on 30 November 2007.¹⁵² The CRPD is the first international instrument that focuses solely on the rights of persons with disabilities.¹⁵³ It provides a framework through which states are held accountable for the manner in which they advance the rights of persons with disabilities.¹⁵⁴

The CRPD affirms a number of important principles in its Preamble including the need for persons with disabilities to be guaranteed full enjoyment of their human rights and fundamental freedoms without discrimination.¹⁵⁵ It recognises that disability is an evolving concept that results from the interaction with attitudinal and environmental barriers that hinder the full and effective participation in society of persons with disabilities on an equal basis with others.¹⁵⁶ It acknowledges that discrimination on the basis of disability is a violation of the inherent dignity and worth of the human person and the need to promote and protect the human rights of all persons with disabilities.¹⁵⁷

¹⁵⁰ This is despite the fact that, as mentioned earlier in this discussion about the ACRWC, the ACRWC prohibits discrimination relating to all children in a broad sense and does not make specific mention of disability as a basis on which discrimination should not occur.

¹⁵¹ Combrinck (n 72 above) 309.

¹⁵² Parliamentary monitoring group website Women in the Presidency Committee meeting 01 March 2011 "South Africa's compliance with UN Convention on Rights of Persons with Disabilities and Rights of Children: Input by Civil Society" <https://pmg.org.za/committee-meeting/12656/> (accessed 31 October 2015).

¹⁵³ Combrinck (n 72 above) 309; Philpott S "Too little, too late? The CRPD as a standard to evaluate South African legislation and policies for early childhood development" (2014) 2 *African Disability Rights Yearbook* 51 57.

¹⁵⁴ *Ibid.*

¹⁵⁵ Preamble to the CRPD.

¹⁵⁶ Preamble to the CRPD.

¹⁵⁷ *Ibid.*

The CRPD contains general principles in article 3 that serve as the basis for it being developed.¹⁵⁸ These are as follows:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women; and
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.¹⁵⁹

The CRPD also contains a number of general obligations that are closely linked to the above general principles.¹⁶⁰ The obligations are necessary for holding states to account on the manner in which they treat persons with disabilities and create the environment appropriate for the fulfilment of the general principles.¹⁶¹ The general obligations require states parties to, inter alia, adopt appropriate legislative, administrative and other measure for the implementation of the rights in the CRPD; modify or repeal legislation, regulations customs and practices that discriminate against persons with disabilities; and include into policies and programmes the promotion and protection of the human rights of persons with disabilities.¹⁶²

In the light of the above discussion on the general principles and obligations contained in the CRPD, the rest of the discussion will briefly focus on some important principles and how they should apply to children with disabilities in South Africa and their socio-economic rights.

¹⁵⁸ Article 3 of the CRPD; Combrinck (n 72 above) 309.

¹⁵⁹ Article 3 of the CRPD.

¹⁶⁰ Philpott (n 153 above) 57.

¹⁶¹ *Ibid.*

¹⁶² Article 4 of the CRPD.

a) Inherent dignity

The principle requires respect for the inherent dignity of persons with disabilities. Dignity must always be the starting point in any discussion on human rights.¹⁶³ The right to dignity, as has been articulated by the South African Constitutional Court, requires all human beings to be treated with respect and concern and it provides guidance on the interpretation of all other human rights and fundamental freedoms.¹⁶⁴ This includes the protection of socio-economic rights that are meant to ensure that all live in dignity through the provision of a basic set of goods or essential resources.¹⁶⁵ Basser has expressed the importance and relevance of respecting and protecting the right to dignity for persons with disabilities in the following manner:

[Respect of the inherent dignity] means that people must be treated as ends in themselves, first as people and only then as people with particular characteristics. For people with disabilities this means asking the question about whether the treatment or interaction is predicated on preserving and protecting the moral worth of the individual, not some idea about the person's disability...¹⁶⁶

It is only after this acknowledgement of the person as a human being that one can then look at meeting the needs that arise as a result of the disability.¹⁶⁷ This ensures that the “whole person” is dealt with.¹⁶⁸ It is submitted that children with disabilities' inherent dignity is respected through the appropriate provision and protection of their right to basic education and social services in a manner that is cognisant of their status as human beings.¹⁶⁹ Human beings who, as a result of the positive influence

¹⁶³ Basser LA “Human Dignity” in Rioux MH, Basser LA & Jones M (eds) *Critical Perspectives on Human Rights and Disability Law* (2011) 36.

¹⁶⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *Nyathi v MEC for the Department of Health, Gauteng* 2008 (5) SA 94 (CC); *S v Makwanyane* 1995 (3) SA 391 (CC); Currie I & de Waal J *The Bill of Rights Handbook* (2013) 251.

¹⁶⁵ Para 1.1.6 above.

¹⁶⁶ Basser (n163 above) 36.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ Nolan highlights the fact that children should be seen as independent rights-bearers, particularly socio-economic rights-bearers, who are “distinct members of the moral community with distinct interests and who are appropriately viewed as self-originating sources of valid moral claims with an equal moral status”. See Nolan A *Children's Socio-Economic Rights, Democracy and the Courts* (2014) 7-10). See also Save the Children “See me, Hear me: A guide to using the UN Convention on the Rights of Persons with Disabilities to promote the rights of children” (2009) 11.

of access to basic education and social services, are given the opportunity to thrive and become contributing members of society.¹⁷⁰

b) Equality and non-discrimination

The general principles also require states to ensure equality of persons with disabilities in different situations as well as to promote non-discrimination.¹⁷¹ Article 5 deals with the principles of equality and non-discrimination and provides that all persons should be seen by states as equal before the law and are entitled to equal protection and equal benefit of the law.¹⁷²

Article 5 goes on to require states to prohibit all forms of discrimination on the basis of disability and to provide equal and effective protection against discrimination to persons with disabilities on all grounds.¹⁷³

The form of equality sought by article 5, which goes beyond that provided in the CRC and the ACRWC,¹⁷⁴ is “substantive equality” which requires acknowledging and accommodating people’s differences and marginalisation as the key to eradicating discrimination.¹⁷⁵ Article 5 does this by encouraging states to take specific measures when necessary to fast-track or achieve genuine equality of persons with disabilities and these measures will not be considered discrimination.¹⁷⁶ Substantive equality requires the analysis of laws, policies and practices to determine what impact they have on disadvantaged groups or individuals.¹⁷⁷ These laws, policies or practices should meet people at their point of need to lift them up and out of their different points of disadvantage and eliminate barriers which exclude them from full participation in different spheres of society.¹⁷⁸ The laws and policies should not reinforce the subordination that the disadvantaged groups are suffering socially, economically and politically.¹⁷⁹

¹⁷⁰ *Ibid.*

¹⁷¹ Article 3 of the CRPD.

¹⁷² Article 5 of the CRPD.

¹⁷³ *Ibid.*

¹⁷⁴ See para 2.3.1.1 and para 2.3.1.3 above.

¹⁷⁵ Philpott (n 153 above) 58.

¹⁷⁶ Article 5 of the CRPD.

¹⁷⁷ Smith A “Equality constitutional adjudication in South Africa” (2014) 14 *African Human Rights Law Journal* 609 613.

¹⁷⁸ Smith (n 177 above) 613.

¹⁷⁹ *Ibid.*

Substantive equality also highlights the recognition of cultural, political and legal choices of social groups.¹⁸⁰ This affirms the acknowledgement and recognition of diversity and differences.¹⁸¹ This helps to boost a desire for equality based on “equal concern and respect across difference”.¹⁸²

Article 5 requires states to take all necessary measures to ensure that reasonable accommodation is provided for the promotion of equality and non-discrimination.¹⁸³ Reasonable accommodation is the carrying out of:

necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.¹⁸⁴

Children with disabilities’ socio-economic rights, including the right to basic education and social services, should be protected in a manner that is on par with the protection of the socio-economic rights of children without disabilities.¹⁸⁵

c) Inclusion and participation

In order to facilitate the inclusion and participation of children with disabilities in their communities and society, the CRPD calls on states parties to firstly remove general societal barriers that prevent the children from accessing mainstream services and facilities.¹⁸⁶ This is seen in article 9 where states are required to eliminate obstacles and barriers by taking:

appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and

¹⁸⁰ Smith (n 177 above) 614.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ Article 5 of the CRPD.

¹⁸⁴ The Preamble to the CRPD; Kayess R & French P “Out of the darkness into light? Introducing the Convention on the Rights of Persons with Disabilities” (2008) 8 *Human Rights Law Review* 1 26.

¹⁸⁵ A report compiled by Save the Children report emphasises the fact that one of the central features of human rights is the recognition that ‘[a]ll individuals are equal as human beings and are entitled to their human rights without discrimination of any kind’ (see Save the Children (n169 above) 11).

¹⁸⁶ Philpott (n 153 above) 58.

systems, and to other facilities and services open or provided to the public, both in urban and rural areas.¹⁸⁷

Article 19 goes further by requiring states to, inter alia, take effective and appropriate measures to ensure the provision of community services and facilities on an equal basis as the general population.¹⁸⁸

The second approach employed by the CRPD to facilitate the inclusion and participation of children with disabilities, is placing the obligation on states parties to make available disability-focused services.¹⁸⁹ Philpott gives the example of the article 26 habilitation and rehabilitation services which are used to enable persons with disabilities to “attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life”.¹⁹⁰

Lastly, the CRPD also places an emphasis on not only the provision of disability related services but also the elimination of stigmatisation and marginalisation of persons with disabilities through the changing of attitudes and practices.¹⁹¹ Article 8 of the CRPD, for example, requires states parties to adopt immediate, effective and appropriate measures that raise awareness in society and families of persons with disabilities; encourage and ensure respect for the rights and dignity of persons with disabilities; combat stereotypes, prejudices and harmful practices against persons with disabilities and promote awareness on the capabilities and contributions of persons with disabilities.¹⁹²

It is submitted that the above measures to ensure inclusion and participation are applicable to the protection of children with disabilities’ socio-economic rights particularly the right to basic education as well as the right to social services.¹⁹³ These rights ensure that children with disabilities are empowered and beneficiaries

¹⁸⁷ Article 9 of the CRPD; Philpott (n 153 above) 58; Kayess & French (n 184 above) 28.

¹⁸⁸ Article 19(c) of the CRPD; Philpott (n 153 above) 58.

¹⁸⁹ Philpott (n 153 above) 59.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Article 8 of the CRPD.

¹⁹³ Nolan notes that children “occupy a different position in society from that of other socially disadvantaged groups ... [theirs is a] more complete and profound” experience. This includes children with disabilities. It is submitted that to combat the negative effects experienced as a result of occupying such a profoundly disadvantaged position, measures that ensure the inclusion and participation of children with disabilities should be pursued (see Nolan (n 169 above) 10).

of special protection respectively, which would not sufficiently occur without adequate measures to ensure inclusion and participation.¹⁹⁴

d) Evolving capacity of the child

Article 3 calls for the “respect for the evolving capacities of children with disabilities”.¹⁹⁵ This is noteworthy as children with disabilities have often been viewed as incapable of having any actual capacity or competence.¹⁹⁶ Societies and communities have often treated children with disabilities as having less capacity and lower competency to learn and/or take responsibility for themselves.¹⁹⁷ The inclusion of the principle in article 3 ensures the existence of a presumption that children with disabilities have the capacity for self-directed decision making and that this capacity is one that develops overtime as with all children.¹⁹⁸ It is submitted that this capacity can be nurtured and developed through access to basic education.

The principle requires that efforts be made to ensure that children with disabilities:

- Have the support that strengthens their capacity for self-directed decision making;
- Are recognised and respected for their capacities and competencies; and
- Are protected from responsibilities and decisions that are inappropriate for their age and maturity.¹⁹⁹

An emphasis is placed on the creation and development of environments that encourage and produce opportunities to allow children with disabilities to influence and inform decisions affecting them.²⁰⁰

However, challenges exist to the implementation of the principle that arise particularly due to the higher levels of overprotection and low expectations that

¹⁹⁴ Para 3.1 and 4.1 below.

¹⁹⁵ Article 3 of the CRPD.

¹⁹⁶ Byrne B “Minding the gap? Children with Disabilities and the United Nations Convention on the Rights of the Persons with Disabilities” in Freeman M *Law and Childhood Studies* (2011) 427; The United Nations Educational, Scientific and Cultural Organisation (UNICEF) “Using the human rights framework to promote the rights of children with disabilities: Discussion paper – An analysis of the synergies between CRC, CRPD and CEDAW” (2009) 15.

¹⁹⁷ Byrne (n 196 above) 427; UNICEF (n 196 above) 15.

¹⁹⁸ Bryne (n 196 above) 427-428.

¹⁹⁹ UNICEF (n 196 above) 16.

²⁰⁰ *Ibid.*

children with disabilities experience due to the perception that they are incapable of having any actual capacity or competence.²⁰¹ Byrne notes the following in this regard:

[T]he extent to which the capacities of children with disabilities are de facto enabled may diverge from that which is possible, becoming contingent upon adult views and understanding of what is considered acceptable and 'safe' for a disabled child to achieve, and/or the type of support that may either be available or perceived as appropriate in particular instances.²⁰²

Byrne notes an obligation upon the Committee on the Rights of Persons with Disabilities as it keeps states parties accountable – to challenge and recognise practices that create barriers to the “processes of maturation and learning experiences by children with disabilities”.²⁰³

e) The CRPD’s focus on the protection of children with disabilities

The CRPD contains a provision, namely article 7, which specifically deals with the protection and advancement of the rights of children with disabilities, including the right to basic education and social services.²⁰⁴ Article 7 is based on two principles contained in the CRC namely the best interests principle and the right to be heard.²⁰⁵ Article 7 states the following:

- 1 States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
- 2 In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
- 3 States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.²⁰⁶

²⁰¹ Byrne (n 196 above) 428.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ Article 7 of the CRPD; Combrinck (n 72 above) 309.

²⁰⁵ Article 3 and Article 12 of the CRC; Byrne (n 196 above) 427.

²⁰⁶ Article 7 of the CRPD.

It may be essential to, as far as possible, interpret the phrase in article 7(1), “all necessary measures”, in a contextual manner, as what is seen as “necessary” may vary between states parties on the basis of economic, social and other circumstances.²⁰⁷ Article 7(2) openly directs the best interests principle to be applied to children with disabilities.²⁰⁸ However, the article states that the best interests should only be a “primary” consideration, thereby weakening the principle’s influence in actions concerning children with disabilities.²⁰⁹ It incurs the risk of other “values” prevailing over or outweighing the best interests of children with disabilities.²¹⁰ The CRC follows the same “watering-down” of the best interest’s principle approach taken by the CRPD. The CRC does not make specific provision for the best interests of children with disabilities, but states in article 3 that in all actions concerning children their best interests should be a primary consideration.²¹¹ The ACRWC on the other hand elevates the role of the best interests principle in the protection of children’s rights.²¹² The ACRWC provides that in all actions concerning the child the best interests of the child shall be “the” primary consideration.²¹³

Byrne further argues that article 7(2) is deficit as it does not contain a definition of “best interests”.²¹⁴ This could lead to the possibility of ineffective implementation as different people will have different views on what best interests comprise. For some it may be the advancement of emotional security and psychological wellbeing for others it could be moral and religious wellbeing.²¹⁵ Byrne argues that this vagueness could lead to the ruin of what is set out and promised in article 7(2).²¹⁶ However, the CRPD is not the only instrument that fails to provide a definition of the best interests principle. Freeman criticises the CRC for not providing guidance on the meaning of the principle.²¹⁷ It is submitted that on a perusal of the ACRWC one also does not notice a definition for the best interests principle.

²⁰⁷ Byrne (n 196 above) 428.

²⁰⁸ *Ibid.*

²⁰⁹ Byrne (n 196 above) 429.

²¹⁰ *Ibid.*

²¹¹ Article 3 of the CRC.

²¹² Mezmur (n 133 above) 18.

²¹³ Article 4 of the ACRWC; Mezmur (n 133 above) 18.

²¹⁴ Byrne (n 196 above) 429.

²¹⁵ Byrne (n 196 above) 429; Freeman M A *Commentary on the Convention on the Rights of the Child: Article 3: The Best Interests of the Child* (2007) 27.

²¹⁶ Byrne (n 196) 429.

²¹⁷ Freeman (n 215 above) 27-31.

However, hope is found in article 7(3) of the CRPD which calls for children with disabilities to express their views in matters affecting them.²¹⁸ The article requires their views to be given due consideration in accordance with their age and maturity.²¹⁹ This article, and its “explication of the disability and age-appropriate assistance”, comes about as a result of the recognition of the discrimination that children with disabilities face due to childhood and disability.²²⁰ Children with disabilities have often been viewed as not being able to contribute to processes affecting them due to the misinformed opinion that they have no views to express.²²¹ This is also due to the assumption that caregivers are able to articulate the interests and lived experiences of children with disabilities; and the view that it is too expensive or difficult to facilitate the views of children with disabilities.²²²

It is interesting to note, in light of Byrne’s argument above, that the ACRWC’s provision on the best interests of the child²²³ is coupled with a provision that provides children with the platform, in judicial or administrative proceedings, to express their views.²²⁴ These views must be taken into consideration by the relevant authorities.²²⁵ This is in addition to the provision that children should be able to express their views in matters concerning them.²²⁶

The CRPD’s provision is similar to one in the CRC, in article 12, which provides that a child who is capable of forming his or her own views should have the right to express their views freely in all matters affecting the child.²²⁷ The views of the child must be given due weight in accordance with the age and maturity of the child.²²⁸

2.3.2 The Constitution of the Republic of South Africa, 1996

It is appropriate to point out and discuss the rights and responsibilities arising from international and regional human rights instruments, but unless these rights and

²¹⁸ Article 7 of the CRPD; Byrne (n 196 above) 429.

²¹⁹ Byrne (n 196 above) 429.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ Article 4(1) of the ACRWC.

²²⁴ Article 4(2) of the ACRWC.

²²⁵ *Ibid.*

²²⁶ Article 7 of the ACRWC.

²²⁷ Article 12 of the CRC.

²²⁸ *Ibid.*

responsibilities are reflected in national laws they will merely be words on paper. International law is not always self-executing and must be enacted into national law.²²⁹ This last section of the chapter will briefly discuss the Constitution of the Republic of South Africa and open up the way for discussions on how South Africa's law provides for the protection of the rights of children with disabilities, particularly socio-economic rights.²³⁰

The Constitution clearly states that it is the supreme law of South Africa and any law or conduct inconsistent with it is invalid.²³¹ The obligations set out in the Constitution must be complied with.²³² The Constitution shapes and informs the manner in which legislation must be drafted, interpreted and implemented.²³³ If any law or conduct is not in line with the Constitution relief can be sought through platforms such as the courts, particularly superior courts, which have the ability to declare such laws or conduct invalid.²³⁴

One of the first rights that the Bill of Rights deals with is equality. It provides in section 9(1) that everyone is equal before the law and has the right to equal protection and benefit of the law.²³⁵ This protection of equality before the law "lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised".²³⁶

Section 9(2) provides that equality is the full and equal enjoyment of all rights and freedoms.²³⁷ To ensure the promotion of equality the section states that legislative and other measures can be taken to protect and advance persons or categories of persons who have been disadvantaged by unfair discrimination, this would include

²²⁹ S 231(4) of the Constitution.

²³⁰ The dissertation will, in chapters 3 and 4 below, discuss how these rights and responsibilities are reflected in national legislation and policies that deal with the socio-economic rights to basic education and social services and the implementation thereof.

²³¹ S 2 of the Constitution.

²³² *Ibid.*

²³³ Currie & De Waal (n 164 above) 7-8.

²³⁴ Skelton A "Constitutional Protection of Children's Rights" in Boezaart T *Child Law in South Africa* (2009) 266.

²³⁵ S 9(1) of the Constitution.

²³⁶ *Fraser v Children's Court, Pretoria North* 1997 (2) BCLR 153 (CC) para 20; see also Boezaart T "A constitutional perspective on the rights of children with disabilities in an educational context" (2012) *Southern African Public Law Journal (SAPL)* 454 459.

²³⁷ S 9(2) of the Constitution.

children with disabilities.²³⁸ This is the endorsement of the use of substantive equality, a principle that is explained earlier in this chapter and promoted by the CRPD.²³⁹ Boezaart points out that children with disabilities should not be treated the same as children without disabilities, due to the fact that children with disabilities have historically been, and continue to be, disenfranchised and have been in more disadvantaged positions in relation to access to different services and spheres of society.²⁴⁰ She notes however that such differentiation must be done in a manner that the needs of each category of persons are accommodated.²⁴¹ The case of *President of the Republic of South Africa v Hugo*²⁴² endorsed this approach when the Constitutional Court, per Goldstone J, held the following:

We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not.

Section 9(3) provides that the state may not unfairly discriminate directly or indirectly on a number of listed grounds which include age and disability.²⁴³ Section 9(4) provides that no person may unfairly discriminate directly or indirectly against another person on the same grounds.²⁴⁴ Section 9(5) states that discrimination on one or more of the grounds listed in section 9(3) is considered unfair unless proved otherwise.²⁴⁵

Boezaart also notes that the right to equality is not just equal treatment before the law and non-discrimination.²⁴⁶ She notes that it also includes equal access to

²³⁸ S 9(2) of the Constitution; Boezaart (n 236 above) 460.

²³⁹ Para 2.3.1.4 above.

²⁴⁰ Boezaart (n 236 above) 460.

²⁴¹ *Ibid.*

²⁴² 1997 (4) SA 1 (CC) at para 41.

²⁴³ S 9(3) of the Constitution: All the grounds listed in this section include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. For a detailed explanation on this section see: Ngcukaitobi T "Equality" in Currie & De Waal (n 164 above) 222-240.

²⁴⁴ S 9(4) of the Constitution; Ngcukaitobi (n 243 above) 225-226.

²⁴⁵ S 9(5) of the Constitution; Ngcukaitobi (n 243 above) 226-235.

²⁴⁶ Boezaart (n 236 above) 460-461.

services and opportunities.²⁴⁷ These services and opportunities go to the heart of realising socio-economic rights and in this context the right to basic education and social services of children with disabilities. The right to equality also includes equal provision of resources that may only be possible, to disadvantaged groups, through differentiation that is based on a legitimate government purpose to lift them out of their position of disadvantage.²⁴⁸ Lastly, equal opportunities arise through the removal of legal and institutional barriers that limit people's participation in and contribution to society, such as the participation of persons with disabilities.²⁴⁹

Section 10 of the Constitution deals with the protection of human dignity and provides that everyone has inherent dignity and the right to have their dignity respected and protected.²⁵⁰ It is comforting to note that even though South Africa ratified the CRPD long after the Constitution came into being; a holistic interpretation and examination of both legal documents shows that they highlight the importance of respecting the inherent dignity of children with disabilities. The respect for human dignity is central to the objective and normative value system established by the Constitution.²⁵¹ This is due to the fact that one of the values that the Constitution is founded on is human dignity.²⁵² The following has been noted by the Constitutional Court of South Africa in respect to the protection of human dignity:

Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in ... [the Bill of Rights].²⁵³

Human dignity is a fundamental value that guides the interpretation of all other rights, including the right to basic education and social services, and is a right in itself that is justiciable and enforceable.²⁵⁴ Children, including children with disabilities, are, therefore, recognised by the Constitution to have a right to inherent human dignity.²⁵⁵ This right to inherent human dignity should be respected and empowers all human

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ S 10 of the Constitution.

²⁵¹ Currie & De Waal (n 164 above) 250.

²⁵² *Ibid.*

²⁵³ *S v Makwanyane* 1995 (3) SA 391 (CC) para 328; Currie & De Waal (n 164 above) 252.

²⁵⁴ Boezaart (n 236 above) 459; Currie & De Waal (n 164 above) 253.

²⁵⁵ Boezaart (n 236 above) 459.

beings with the ability to enjoy the different benefits of afforded to them by law and policy.²⁵⁶

The children's rights section is contained in section 28 of the Constitution. Section 28(1) contains a range of rights applicable to children, including children with disabilities, such as, inter alia, the right to a name and nationality from birth; to family care, parental care or appropriate alternative care; to basic nutrition, shelter, basic health care services and social services; and to be protected from exploitative labour practices.²⁵⁷ The rights in section 28(1) are in addition to, and their effect is augmented, by other rights in the Bill of Rights such as the section 26 and section 27 rights to housing, health care, nutrition and social security.²⁵⁸ In addition, section 29 of the Constitution states that everyone, including children with disabilities, has the right to a basic education.²⁵⁹

Section 28(2) deals with the best interests of the child and provides that a child's best interests are of paramount importance in every matter concerning the child.²⁶⁰ The application of section 28(2) is extended to all aspects of law affecting children.²⁶¹ It assists in the interpretation and development of rights contained in section 28(1) as well as other rights contained in the Constitution.²⁶² It therefore contributes to the interpretation and development of the right to basic education and social services. It, as a result, establishes itself as a right and not just a guiding principle.²⁶³ The value that the Constitution places on the best interests of the child is similar to that of the ACRWC,²⁶⁴ as both legal documents elevate the role of the best interests of the child. The Constitution does this with its use of the word "paramount" and as discussed earlier, the ACRWC does this with its use of the phrase "the primary

²⁵⁶ *Ibid.*

²⁵⁷ S 28(1) of the Constitution.

²⁵⁸ Skelton (n 234 above) 600.

²⁵⁹ S 29 of the Constitution; Skelton (n 234 above) 600.

²⁶⁰ S 28(2) of the Constitution; this is similar to the ACRWC's provision as discussed in para 2.3.1.4 above.

²⁶¹ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) para 17 (*Fitzpatrick* case); Skelton (n 234 above) 619.

²⁶² *Ibid.*

²⁶³ *Fitzpatrick* case para 17; Skelton (n 234 above) 619-620.

²⁶⁴ Para 2.3.1.4 above.

consideration”²⁶⁵ when discussing the best interests of the child and its consideration in matters affecting children.

It should be noted, however, that section 28(2) does not serve as a right that trumps all rights.²⁶⁶ As Skelton notes it is a right that can be limited as it exists in a non-hierarchical system of rights.²⁶⁷ The Constitutional Court is of the view that what is important is the contextual nature and inherent flexibility of section 28.²⁶⁸ The best interests principle needs to be flexible to ensure that individual circumstances of a case determine which factors guarantee the best interests of a child.²⁶⁹ Sachs J notes that “[a] truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved”.²⁷⁰

The Constitutional Court points out that the ambit of section 28 is undoubtedly wide, with its comprehensive and emphatic language.²⁷¹ The section demonstrates that:

just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and the courts must function in a manner which at all times shows due respect for children’s rights.²⁷²

The Constitutional Court also affirms the importance of section 28 by acknowledging that it creates conditions for children to enjoy their childhood to the fullest extent through the promotion of a secure and nurturing environment free from violence, fear, want and avoidable trauma.²⁷³ It does this through the creation of “conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives”.²⁷⁴ For children with disabilities this maximisation of opportunities includes, inter alia, their exposure to basic education that nurtures and develops their

²⁶⁵ *Ibid.*

²⁶⁶ Skelton (n 234 above) 620.

²⁶⁷ *Ibid.*

²⁶⁸ *S v M* 2008 (3) SA 232 (CC) paras 23 and 24.

²⁶⁹ *S v M* para 24.

²⁷⁰ *Ibid.*

²⁷¹ *S v M* para 15.

²⁷² *Ibid.*

²⁷³ *S v M* paras 18 and 19.

²⁷⁴ *S v M* para 20.

minds and social services that protect them from the negative effects of the infringement of their rights.

2.4 CONCLUSION

Chapter 2 takes the reader through a discussion on the development in the manner in which disability has been viewed and responded to. This has a direct impact on how children with disabilities interact with society, their communities and personal environments. The medical model causes persons with disabilities, and, therefore, children with disabilities, to be treated as people solely in need of medical and welfare interventions with little attention paid to society's role in their exclusion. The social model turns the attention away from the perceived individual imperfections as the cause of disability to society's inability to be inclusive in its functioning. The social model was and continues to drive a movement that brings a voice to the experiences of persons, and children, with disabilities. The movement demands that they be heard and creates a platform for persons with disabilities to themselves express their struggles and needs. They are able to express these struggles and needs from a place of personal and individual experience.

The chapter then discusses the human rights approach to disability as influenced by the social model. It discusses the importance of advancing the rights of persons with disabilities and children with disabilities, through the use of the human rights approach as influenced by the social model. The human rights approach enhances the idea and practice of the protection of socio-economic rights, and in the context of this dissertation the right to basic education and the right to social services.

The international and regional instruments and the Constitution all have one theme in common; they all acknowledge that children with disabilities must be respected as human beings. They recognise that children with disabilities are human beings whose dignity needs to be respected and who need to be treated equally before the law. They also recognise that children with disabilities should be provided with opportunities, through amongst other things basic education, and enabling environments, through social services, to ensure their full development as well as equal participation in society.

The discussions touched on the protections offered by the CRC and the ACRWC. The CRC and the ACRWC are both progressive and cutting-edge instruments in their own right. The CRC as the only United Nations document that deals specifically with the rights of children affirms the importance of the rights of children with disabilities by having a provision dedicated to their rights. The ACRWC, as a document that protects the rights and wellbeing of children with disabilities in their African context, affirms that children with disabilities also have contextual challenges that need special attention and solutions that can only be formulated in that context and not necessarily by a body like the United Nations. However, the chapter also notes that despite the ground breaking manner in which the CRC and ACRWC provide for children with disabilities, there are also a number of ways that instruments are found lacking.

The CRPD deals strikingly with the deficiencies in the CRC and the ACRWC. As a human rights instrument dedicated to the protection of the rights and freedoms of persons with disabilities it touches on and expands on different issues that the CRC and ACRWC were too limited in scope to deal with. These include issues such as inherent dignity, non-discrimination, inclusion, equality of opportunity and evolving capacities of children with disabilities.

The Constitution, particularly section 28, is expressive of the international conventions that South Africa is a signatory to and has an obligation to comply with.²⁷⁵ South Africa has developed a number of legislative documents to respond to these international and constitutional obligations in a more extensive and practical manner.²⁷⁶

The next two chapters of this dissertation will address the research questions and focus on legislative documents and their implementation in relation to children with disabilities.

²⁷⁵ Skelton (n 234 above) 600-601.

²⁷⁶ *Ibid.*

CHAPTER THREE: ACCESS TO BASIC EDUCATION FOR CHILDREN WITH DISABILITIES IN SOUTH AFRICA – INCLUSIVE RHETORIC OR EXCLUSIVE PRACTICES

3.1 INTRODUCTION

The socio-economic right to education is known as an empowerment right through which marginalised people can take themselves out of poverty and participate fully in society and their communities.¹ Education is, therefore, said to be a means by which marginalised people are able to realise their other human rights.² It is in this light that it is important to affirm the fact that children with disabilities, like all other children, have the right to access formal basic education without discrimination.³ It is said that the right to basic education is the most important right for children with disabilities and is also the right that is most often denied.⁴ Education must be provided in a manner that respects the inherent dignity and equality of children with disabilities.⁵ It must also be provided in a non-discriminatory manner.⁶

Receiving education allows children with disabilities to be able to effectively protect themselves against exploitation and to be empowered by and informed of their fundamental human rights.⁷ It also gives their minds the freedom to “wander freely and widely”; an ability that is considered one of the joys and rewards of human existence.⁸ Education also gives children with disabilities the ability to live independent lives as well as to contribute to and participate in their communities and

¹ United Nations Educational, Scientific and Cultural Organisation (UNICEF) “World Education Forum 2015, 19-22 May 2015, Incheon, Republic of Korea: Equitable and inclusive quality education and lifelong learning for all by 2030” <http://en.unesco.org/world-education-forum-2015/5-key-themes/right-education> (accessed 28 November 2015).

² Committee on Economic, Social and Cultural Rights “General Comment 13: The right to education” (1999) (General Comment 13) para 1.

³ The Committee on the Rights of the Child “General Comment 9: The rights of children with disabilities” (2006) (General Comment 9) para 62.

⁴ Combrinck H “The Hidden Ones: Children with Disabilities in Africa and the Right to Education” in Sloth-Nielsen J (ed) *Children’s Rights in Africa* (2008) 299.

⁵ Para 2.4 above contains an introductory discussion on dignity, equality and non-discrimination.

⁶ *Ibid.*

⁷ General Comment 9 (n 3 above) para 1.

⁸ *Ibid.*

society.⁹ Education gives all children, including children with disabilities, the knowledge of and ability to understand the importance of the rights to inherent dignity, equality and non-discrimination and what impact these and other rights have on their lives.

This chapter will aim to determine how South Africa provides for and protects the right to basic education, in particular, for children with disabilities. The goal of this chapter is to determine whether children with disabilities have unhindered access to basic education. If it is found that access to basic education is lacking for children with disabilities, the next step will be to establish the ways in which they are being prevented from fully accessing basic education and what policy and implementation gaps need to be filled.

This will be done through a discussion of selected international and regional human rights instruments that South Africa is a signatory to. This will highlight South Africa's obligations to protect the right to basic education in terms of these instruments. The discussion will also focus on provisions in and implementation of the South African Constitution, national legislation and policy. Case law and how it has contributed to the development of the law and its implementation will also be discussed.

3.2 INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

International and regional human rights instruments recognise the right to education and protect the rights of all children, and therefore, children with disabilities, to access education services.¹⁰ They place obligations on ratifying states to ensure that this right is adequately protected and provided for. The provisions of the CRC, the ACRWC and the CRPD will be highlighted.¹¹

⁹ *Ibid.*

¹⁰ Arendse I "The obligation to provide free basic education in South Africa: An international law perspective" (2011) *Potchefstroom Electronic Law Journal (PER)* 97 98-99; Viljoen F "The African Charter on the Rights and Welfare of the Child" in Boezaart T (ed) *Child Law in South Africa* (2009) 339. See para 3.2.1, 3.2.2 and 3.2.3 below.

¹¹ In addition refer to para 2.4 above, for a general discussion on international and regional human rights instruments.

3.2.1 The United Nations Convention on the Rights of the Child, 1990

The CRC in article 23(3) places an obligation on ratifying states to ensure that children with disabilities have access to education.¹² The article provides that one of the ways of recognising the special needs of children with disabilities is to provide assistance to them free of charge and provide effective access to education.¹³ This assistance must be provided in a manner that ensures that children with disabilities are able to achieve the fullest possible social integration and individual development, including their cultural and spiritual development.¹⁴

Article 28(1)(a) places a duty on states to recognise the right of “every” child to education; this includes making primary education compulsory and free to all. Article 29(1) then sets out the aims of education as seen below:

- (1) States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.¹⁵

The Committee on Rights of the Child states that these aims are meant to promote and support the CRC's recognition of a child's innate human dignity, their equal and inalienable human rights as well as their special developmental needs and diverse

¹² Akinbola BR “The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities” (2010) 10 *African Human Rights Law Journal* 457 464. See para 2.4.1.1 above on article 23(3) of the CRC.

¹³ Article 23(3) of the CRC.

¹⁴ *Ibid.*

¹⁵ Article 29(1) of the CRC.

evolving abilities.¹⁶ The Committee notes that in addition to expanding on the right to education contained in article 28, article 29(1) also highlights the fact that the goal of the provision of education should be to empower a child through the development of their skills, learning and other capacities, human dignity, self-esteem and self-confidence.¹⁷

Article 29 highlights a number of important principles that point to the fact that the right to education should not be seen outside of the other rights and principles in the CRC: The first is that article 29 cannot be read or applied in isolation from the other provisions in the CRC.¹⁸ The article draws upon, reinforces, integrates and complements articles that deal with, inter alia, non-discrimination (article 2), the best interests of the child (article 3), the right to life, survival and development (article 6), participation (articles 12 and 31) and the rights of children with disabilities (article 23).¹⁹

Secondly, the article emphasises the fact that the right to education is not only promoted through curriculum development but also through the development of teaching methods and the education environment.²⁰

Thirdly, the article emphasises the need for education to take an individual and child-centred approach.²¹ A vital objective of education should be to acknowledge the fact that children each have unique characteristics, interests, abilities and learning needs.²² This should be done to ensure that education offered develops children's individual personalities, talents and abilities.²³ The education offered must be applicable to the children's social, cultural, environmental and economic context; it must be applicable to children's present and future needs; take into account

¹⁶ Committee on the Rights of the Child "General Comment 1: The aims of education" (2001) (General Comment 1) para 1.

¹⁷ General Comment 1 (n 16 above) para 2.

¹⁸ General Comment 1 (n 16 above) para 6; Hodgkin R & Newell P *Implementation Handbook for the Convention of the Rights of the Child* (2007) 439.

¹⁹ *Ibid.*

²⁰ General Comment 1 (n 16 above) para 8; Hodgkin & Newell (n 18 above) 439.

²¹ *Ibid.*

²² Article 29 (1)(a) of the CRC; General Comment 1 (n 16 above) para 8; Hodgkin & Newell (n 18 above) 439.

²³ Article 29 (1)(c) of the CRC; Boezaart T "The Children's Act: A valuable tool in realising the rights of children with disabilities" (2011) 74 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 264 266.

children’s evolving capacities and must ensure that children are imparted with essential life skills necessary to confront life challenges.²⁴

Fourthly, education must be approached in a holistic manner to maximise a child’s ability and opportunity to fully participate in society.²⁵ The education must deal with the physical, mental, spiritual, emotional, intellectual, social and practical aspects of a child’s life.²⁶ The fifth point is that education must promote and reinforce the ethical values set out in the CRC.²⁷ Lastly, it should be recognised that children’s ability to enjoy their human rights and participate in society can be limited by the failure of education to promote the values in article 29.²⁸

3.2.2 The African Charter on the Rights and Welfare of the Child, 1981

The ACRWC also recognises the right to education and places the obligation on states parties to provide and protect access to education. The ACRWC protects children’s right to education in article 11(1) by providing that “every” child has the right to education.²⁹

Article 11(2) sets out the purposes of education as being, inter alia, to promote and develop the child’s personality, talents and mental and physical abilities to the fullest potential; to foster respect for human rights and fundamental freedoms set out in African regional and international instruments; to promote the child’s understanding of primary healthcare; and to preserve and strengthen positive African morals, traditional values and cultures.³⁰ The first two purposes of education as set out in the ACRWC are similar to those set out in the CRC as discussed above.³¹ The last two purposes set out in the ACRWC are specific to the Charter, it is submitted that their inclusion reveals the intention of the ACRWC to promote the right to education in a manner addressing matters unique to the African context.

²⁴ *Ibid.*

²⁵ General Comment 1 (n 16 above) para 12.

²⁶ Article 29(1)(d); General Comment 1 (n 16 above) para 12.

²⁷ General Comment 1 (n 16 above) para 13.

²⁸ General Comment 1 (n 16 above) para 14.

²⁹ Article 11(1) of the ACRWC.

³⁰ Article 11(2) of the ACRWC.

³¹ Para 3.2.1 above.

Article 11(3) sets out the obligations placed on states parties in order to achieve full realisation of the right to education.³² They are required to provide, inter alia, free and compulsory basic education³³ and take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.³⁴ This article is important for African contexts which are still dealing with and addressing the effects of social imbalances.³⁵

Article 13 of the ACRWC then goes on to deal with what it terms “handicapped children”.³⁶ Article 13(2) in particular provides that states parties must make sure that children with disabilities have access to training, preparation for employment and recreational opportunities.³⁷ It also provides that this assistance must be provided in a manner that is conducive to the child achieving the fullest possible social integration, individual development and cultural and moral development.³⁸ One cannot help but feel slightly let down by the provision as it makes no specific mention of access to education unlike its counterpart in the CRC, which is article 23(3) of the CRC.³⁹ This is disappointing as the educational needs of children with disabilities and those of children without disabilities are different.⁴⁰

3.2.3 The United Nations Convention on the Rights of Persons with Disabilities, 2006

As has been discussed in chapter 2, the CRPD affirms that children with disabilities need to be treated as human beings with inherent human dignity and as human beings who are to be treated with equality and not discriminated against.⁴¹ Children with disabilities should be treated in a manner that is inclusive and promotes their

³² Article 11(3) of the ACRWC.

³³ This chapter will contain a discussion on what “basic education” means in the South African context. This discussion will be in the section discussing provisions in the South African Constitution and legislation, para below 3.3.3.

³⁴ Article 11(3) of the ACRWC.

³⁵ Gose M *The African Charter on the Rights and Welfare of the Child* (2002) 116.

³⁶ The use of the term “handicapped children” is very unfortunate particularly in an African regional instrument that influences national legislation and government activities. Particularly in the light of the discussion in chapter 1 of this dissertation, on the negative effects of inappropriate terminology to refer to a marginalised group. See para 1.1.3 above.

³⁷ Article 13(2) of the ACRWC.

³⁸ *Ibid.*

³⁹ Article 13(2) of the ACRWC.

⁴⁰ Combrinck (n 4 above) 311.

⁴¹ Para 2.4.1.4 of above.

participation in society; and as children whose capacities are evolving.⁴² One of the ways that this is done is through the recognition of their right to education.⁴³ The CRPD recognises the right of persons with disabilities to education in article 24. It goes without saying that this right is extended to children with disabilities.

Article 24(1) of the CRPD provides that the right to education must be realised on a basis of non-discrimination and equal opportunity.⁴⁴ It provides that an inclusive education system must be ensured at all levels.⁴⁵ It is important to applaud the CRPD's inclusion of "equal opportunity" and "inclusive education" in an article focusing on access to education. The CRPD is as a result more expressive of the protection of children with disabilities' right to education must be protected and the means by which this must be achieved, than the CRC and the ACRWC.⁴⁶ This is not a negative criticism of the CRC and the ACRWC at all; it is instead a recognition of how seriously the CRPD acknowledges the historical and prevalent barriers that children with disabilities have had the face in their attempts to access education. The emphasis on "equal opportunity" and "inclusive education" is one of many mechanisms used in the efforts to remove these barriers. The aims of education are also set out in article 24(1). They include:

- (a) The full development of human potential and sense of dignity and self-worth, as well as the strengthening of respect for human rights, fundamental freedoms and human diversity;
- (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; and
- (c) Enabling persons with disabilities to participate effectively in a free society.⁴⁷

The aims set out in the CRPD, though specifically directed at persons with disabilities, are similar to those set out in article 29 of the CRC.⁴⁸ The CRC however goes into a bit more detail and states that other aims of education include the development of respect of a child's parents, cultural identity, language and values;

⁴² *Ibid.*

⁴³ Quinn G "A short guide to the United Nations Convention on the Rights of Persons with Disabilities" (2009) *European Yearbook of Disability Law* 89 110.

⁴⁴ Article 24(1) of the CRPD; Combrinck (n 4 above) 309.

⁴⁵ *Ibid.*

⁴⁶ Para 3.2.1 and para 3.2.2 above.

⁴⁷ *Ibid.*

⁴⁸ Para 3.2.1 above.

the preparation of the child for responsible life in a free society; and the development of respect for the natural environment.⁴⁹

Article 24(2) contains the obligations that states parties have in ensuring that the right to education is fully realised. Firstly, persons with disabilities should not be excluded from receiving education on the basis of disability and children with disabilities are not to be excluded from receiving free and compulsory basic education.⁵⁰ This is similar to article 28(1)(a) of the CRC and article 11(3) of the ACRCW which also provide for free and compulsory basic education. Inclusive, quality and free education should be accessed by persons with disabilities on a basis of equality with others.⁵¹ Individual requirements should be reasonably accommodated and support provided in the general education system in order to facilitate effective education.⁵² Lastly, in order to make the most of academic and social development, effective individual support measures must also be provided.⁵³

Article 24(3) sets out measures that states parties should take in order to allow persons with disabilities to learn life and social development skills that will facilitate full and equal participation in education and communities.⁵⁴ These measures, as set out in article 24(3), include:

- (a) Facilitating the learning of braille, alternative script, augmentative and alternative models, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
- (b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community; and
- (c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximise academic and social development.⁵⁵

⁴⁹ *Ibid.*

⁵⁰ Article 24(2) of the CRPD; Combrinck (n 4 above) 909; Murungi LN “Inclusive basic education in South Africa: issues in its conceptualisation and implementation” (2015) 18 *Potchefstroom Electronic Law Journal (PER)* 3170.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Article 24(3) of the CRPD.

⁵⁵ *Ibid.*

Article 23(4) further provides that in order to ensure that the right to education is realised for persons with disabilities, the teachers employed, including teachers with disabilities, should be proficient in sign language and/or braille.⁵⁶ Professionals and staff that work at all levels of education should also be trained in, inter alia, disability awareness, the use of appropriate means of communication and educational techniques and materials to support persons with disabilities.⁵⁷

The CRC and the ACRWC provide for the right to education for all children, including children with disabilities, in ways unique to the instruments; the CRC as the first United Nations instrument specifically dealing with children's rights and the ACRWC promoting this right in a manner that is respectful of the African context that children are in. The CRPD on the other hand specifically recognises the right of children with disabilities to access basic education. It is refreshing that despite noticeable differences in the instruments they all essentially have one thing in common: the development of children to ensure their full participation in society.

The discussions will now examine the Constitution, national legislation and policy.

3.3 THE SOUTH AFRICAN CONSTITUTION AND NATIONAL LEGISLATION

The South African Constitution, particularly the Bill of Rights, applicable national legislation and accompanying policy recognise the right to education.⁵⁸ They recognise that everyone must and can acquire and increase their knowledge and skills and increase their individual abilities.⁵⁹ The discussion below will examine how this recognition is reflected in these legal documents for children with disabilities and if they are in compliance with international and regional law.

3.3.1 The Constitution of the Republic of South Africa, 1996

Section 29 in the Bill of Rights of the Constitution protects the right to education and provides the following:

- (1) Everyone has the right –

⁵⁶ Article 24(4) of the CRPD.

⁵⁷ *Ibid.*

⁵⁸ See also para 2.4.2 above, for a general discussion on the protections offered to children with disabilities in the Constitution.

⁵⁹ Rautenbach IM & Malherbe EFJ *Constitutional Law* (2009) 389.

- (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.⁶⁰

Section 29(1)(a), states that *everyone* has the right to basic education, which automatically includes children with disabilities.⁶¹ The section places a dual obligation on the state to not interfere with access to basic education (negative duty) and to provide basic education (positive duty).⁶² However, unlike the CRC and ACRWC, the Constitution does not explicitly state that basic education must be provided free of charge. This does not necessarily mean that the Constitution should be interpreted to not promote the provision of free basic education; this is quite the contrary as will be discussed later in the chapter.⁶³

⁶⁰ *Ibid.*

⁶¹ S 29(1)(a) of the Constitution.

⁶² S 29(1)(a) of the Constitution; Veriava F & Coomans F “The right to education” in Brand D & Heyns C *Socio-Economic Rights in South Africa: International and Constitutional Law* (2005) 61; Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 243.

⁶³ Para 3.5.1.2 below.

The right to basic education as formulated in the section is an unqualified right that does not contain any internal qualifiers or limitations.⁶⁴ It is argued that the fact that the right to basic education is an unqualified right means that the state is required to give effect to it as a matter of priority.⁶⁵ The state must do this through development of programmes, policies and budgetary allocations that give effect to the right over other spending requirements.⁶⁶ This is of particular importance to children with disabilities.⁶⁷ This suggests that children with disabilities have a direct or immediate claim against the state for access to basic education.⁶⁸

Section 29(2) states that everyone has the right to receive education in the official language or languages of their choice to ensure effective and equitable access to education.⁶⁹ The state must take into account equity, practicability and the need to redress the results of past discriminatory laws and practices in ensuring implementation of this section.⁷⁰ Boezaart points out that this means that education may be provided in sign language and braille.⁷¹ The section can, as of South Africa's ratification of the CRPD, be read with article 24(3) of the CRPD which provides for measures that states should take to promote access to education for persons with disabilities, these include ensuring that persons who are blind, deaf or deafblind receive education in the most appropriate language and means of communication for them.⁷²

Section 29(3) states that individuals can establish and maintain educational institutions at their own expense and section 29(4) provides that state subsidies can

⁶⁴ Bekink B and Bekink M "Children with disabilities and the right to education: A call for action" (2005) 1 *Stellenbosch Law Review* 132 133-134; Liebenberg (n 62 above) 244; Arendse (n 10 above) 116-117.

⁶⁵ Veriava & Coomans (n 62 above) 62. It should be noted however that when South Africa ratified the International Covenant on Economic, Social and Cultural Rights in January 2015, it declared that the right to basic education will be given "progressive effect" within the framework of the National Education Policy and available resources. This is extremely concerning and is in contradiction with Constitutional Court rulings that state that South Africa has the immediate obligation to fulfil the right, see *Governing Body of the Juma Masjid Primary School v Essay (Centre for Child Law as Amici Curaie)* 2011 (8) BCLR 761 (CC) para 37; Human Rights Watch "Complicit in Exclusion: South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities" (2015) 17-18.

⁶⁶ Veriava & Coomans (n 62 above) 62.

⁶⁷ Bekink & Bekink (n 64 above) 133-134; Liebenberg (n 62 above) 244.

⁶⁸ *Ibid.*

⁶⁹ S 29(2) of the Constitution.

⁷⁰ *Ibid.*

⁷¹ Boezaart T "A constitutional perspective on the rights of children with disabilities in an educational context" (2012) 27 *Southern African Public Law Journal (SAPL)* 455 458.

⁷² Para 3.2.3 above.

be provided to these institutions.⁷³ Boezaart notes that it is not rare to see organisations providing educational services to children with disabilities.⁷⁴

Other rights in the Bill of Rights that are important and impact the access to basic education for children with disabilities are firstly, the right to equality as set out in section 9 of the Constitution and discussed in chapter 2 of this dissertation.⁷⁵ The section requires access to basic education and educational facilities to be available on a basis of equal opportunities to education according to the abilities and potential of individual persons.⁷⁶ Secondly, the right to human dignity protected by section 10 of the Constitution, and discussed in chapter 2 of this dissertation, requires children with disabilities to have their dignity respected and protected as they access education and in daily interactions with fellow learners and educators.⁷⁷

An examination of section 28 of the Constitution⁷⁸ reveals that a number of the rights contained therein can be applied to children with disabilities as they access basic education in education institutions and settings.⁷⁹ Such rights include the right to basic nutrition, shelter, basic health care services and social services;⁸⁰ the right to be protected from maltreatment, neglect, abuse or degradation⁸¹ and the right to have their best interests considered of paramount importance in matters concerning children with disabilities.⁸² When the best interests standard is considered in the light of the right to basic education it can be said that “every education authority and individual educator should be able to show that any decision affecting a child has been taken with the best interests of the child in mind”.⁸³

⁷³ S 29(3) and (4) of the Constitution.

⁷⁴ Boezaart (n 71 above) 458.

⁷⁵ S 9 of the Constitution; para 2.4.2 above.

⁷⁶ Malherbe R “The Impact of Constitutional Rights on Education” in Boezaart T (ed) *Child Law in South Africa* (2009) 421-422.

⁷⁷ S 10 of the Constitution; Malherbe (n 76 above) 425; para 2.4.2 above.

⁷⁸ See para 2.3.2 above for a brief discussion of s 28.

⁷⁹ Lake L & Pendlebury S “Children’s right to basic education” in Pendlebury S, Lake L & Smith C (eds) *South African Child Gauge 2008/2009* (2009) 20-21.

⁸⁰ S 28(1)(c) of the Constitution; Lake and Pendlebury (n 79 above) 20-21.

⁸¹ *Ibid.*

⁸² S 28(2) of the Constitution.

⁸³ Malherbe (n 76 above) 440.

3.3.2 The South African Schools Act 84 of 1996

The South African Schools Act 84 of 1996 (the Schools Act) regulates the manner in which access to schools is determined; it ensures that all learners have access to quality education without discrimination and regulates the way in which schools are governed and funded.⁸⁴ The implementation of the Act must be done in the light of Constitutional provisions.

The Act starts off by, in section 3(1), making school attendance compulsory for children from the age of 7 to the age of 15 or the ninth grade, whichever comes first.⁸⁵ The Act further goes on to, in section 3(2), give the Minister of Basic Education the power to determine the ages of compulsory attendance at school for learners with “special education needs”.⁸⁶ The Minister has to date not yet determined these ages for compulsory school attendance.⁸⁷ This makes it difficult to keep government accountable in its obligation to provide education to children with disabilities as set out in international and regional instruments as well as the Constitution. Numerous children with disabilities are currently denied access to education as a result of their disabilities or the special support necessary for them to learn on an equal basis with other children, this will be discussed in more detail further on in this chapter.⁸⁸

Section 3(3) of the Act states that the Member of the Executive Council (MEC)⁸⁹ in every province has the duty to ensure that there are enough school places in the

⁸⁴ Pendlebury S “Meaningful access to basic education” in Pendlebury, Lake & Smith (n 79 above) 25. The Schools Act 84 of 1996 (the Schools Act) is the only piece of legislation referred to in this chapter due to the fact that it is the main piece of legislation that, as stated in its Preamble, aims to establish a “...new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in doing so lay a strong foundation for the development of all our people’s talents and capabilities ...”

⁸⁵ S 3(1) of the Schools Act.

⁸⁶ S 3(2) of the Schools Act.

⁸⁷ Martin P “Children’s rights to basic education: A review of South Africa’s laws and policies” in Proudlock P (ed) *South Africa’s progress in realising children’s rights: A law review* (2014) 142; Human Rights Watch (n 65 above) 33-34.

⁸⁸ Human Rights Watch (n 65 above) 33.

⁸⁹ All of the nine provinces in South Africa have their own legislatures. These legislatures elect one of their members as premiers to head the provincial governments. The premier in turn appoints an Executive Council (akin to the national Cabinet), consisting of members of the legislature, to administer the various departments of the provincial administration. These heads of department are known as members of the Executive Council, or MECs: <http://www.southafrica.info/about/government/govprov.htm#.VmVYp3YrLIW> (accessed 04 December 2015).

province so that every child in that province can attend school.⁹⁰ Section 3(4) provides that if the MEC cannot comply with subsection (3) because of a lack of capacity he or she must take steps to remedy such lack of capacity as soon as possible.⁹¹ This chapter will discuss the extent to which schools or school places are currently being made available to children with disabilities.⁹²

In terms of section 3(5) of the Act, if a child that is subject to compulsory school attendance does not enrol at a school or fails to attend a school then the provincial Head of Department may investigate the child's circumstances, take appropriate steps to remedy the situation and when necessary require parents to have the learner in school.⁹³ Section 5(1) of the Schools Act provides that public schools must admit children and meet their educational needs without unfairly discriminating against them in any way.⁹⁴ Section 5(2) provides that the school governing bodies of public schools may not administer any test related to the admission of a child to a school.⁹⁵ Section 5(3) states, inter alia, that no learner may be refused admission to a public school because his or her parents cannot pay the school fees required.⁹⁶ It is submitted that it is important to note that it is difficult to keep government accountable in its enforcement of these sections in respect of children with disabilities as the Minister has not determined compulsory ages of school attendance for them.

Despite the above challenge, efforts should still be made to ensure that children with disabilities access basic education in public schools. Even though the Schools Act came into operation years before South Africa ratified the CRPD one cannot help but be drawn to the provisions of the CPRD, after engaging with the obligations set out in sections 3 and 5 of the Schools Act, that call on states to ensure access to education for persons, and children with disabilities.⁹⁷ Sections 3 and 5 can therefore be read together with the CRPD to encourage greater implementation of the various

⁹⁰ S 3(3) of the Schools Act.

⁹¹ S 3(4) of the Schools Act.

⁹² Para 3.4 of this chapter.

⁹³ S 3(5) of the Schools Act.

⁹⁴ S 5(1) of the Schools Act.

⁹⁵ S 5(2) of the Schools Act.

⁹⁶ S 5(3)(a) of the Schools Act.

⁹⁷ Para 3.2.3 above.

stakeholders' responsibilities to remove barriers in the education system that hold children with disabilities back.

Section 12(4) of the Schools Act states that the MEC of a province must where reasonably practicable, provide education for learners with “special education needs at ordinary public schools and provide necessary educational support services for the learners”.⁹⁸ If the admission to a school is refused on the basis of the disability an appeal can be addressed firstly to the Head of the Education Department and if not successful then to the MEC of Education in the province.⁹⁹ If the matter is still not resolved then the courts can be approached.¹⁰⁰

The state has the duty to provide alternative education options to children with disabilities.¹⁰¹ Children should only be placed in special schools or separate schools or classes if access to mainstream schooling is not possible and/or is not accessible.¹⁰² This alternative placement should be shown to be in the best interests of the child concerned.¹⁰³

Section 6(2) of the Schools Act places the responsibility of determining the language policy of a school on the school governing body.¹⁰⁴ Section 6(3) provides that no form of racial discrimination must affect the implementation of the language policies.¹⁰⁵ This must be done in accordance with the Constitution, the Schools Act and any applicable provincial legislation.¹⁰⁶ Section 6(4) provides that a recognised form of sign language will be considered a formal language for the purposes of learning at a public school.¹⁰⁷

⁹⁸ S 12(4) of the Schools Act.

⁹⁹ Bekink & Bekink (n 64 above) 139.

¹⁰⁰ *Ibid.*

¹⁰¹ Bekink & Bekink (n 64 above) 140.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ S 6(2) of the Schools Act; Norms and Standards for the development of language policy have been developed: Norms and Standards Regarding Language Policy published in terms of s 6(1) of the South African Schools Act, 1996.

¹⁰⁵ S 6(3) of the Schools Act.

¹⁰⁶ *Ibid.*

¹⁰⁷ S 6(4) of the School's Act.

3.3.3 The content of the right to “basic education”

It is important to briefly discuss the meaning of the right to “basic education” as set out in the Constitution before going into a more detailed discussion on what this means for children with disabilities. Veriava and Coomans note that in order to determine whether the state has met its obligations in terms of ensuring the right to basic education, it is important to determine the scope and content of the right.¹⁰⁸ This determination will also allow the state to measure whether other educational institutions are meeting their obligations to provide quality basic education.¹⁰⁹ The public will also be equipped to keep the state and other educational institutions accountable.¹¹⁰

Unfortunately, neither the Constitution nor the Schools Act defines what “basic education” means.¹¹¹ The Constitutional Court has also not made a pronouncement on what basic education is.¹¹² There exists no certainty in South African law about whether basic education refers to mere school attendance for a specified period of time or the quality of education provided during a certain period of time.¹¹³ Simbo argues that the latter is the approach to be taken when seeking to devise a definition for basic education.¹¹⁴

The Schools Act is the first port of call in the enquiry on the meaning of basic education in the South African context.¹¹⁵ The Act’s statement on when it is compulsory for children to access education, namely from the age of 7 to the age of 15 or the ninth grade whichever comes first, is important.¹¹⁶ The Schools Act does not define basic education but it makes sure that children of a certain age and/or school grade are able to obtain basic education with the schools being the forums for

¹⁰⁸ Veriava & Coomans (n 62 above) 64.

¹⁰⁹ Simbo C “Defining the term basic education in the South African Constitution: An international law approach” (2012) 16 *Law, Democracy and Development* 162 165.

¹¹⁰ *Ibid.*

¹¹¹ Simbo (n 109 above) 163; Veriava & Cooman (n 62 above) 63.

¹¹² *Ibid.* South African courts have however produced a body of jurisprudence on different aspects of the right to basic education. For a discussion of these see Murungi (n 50 above) 3164-3166 and also Skelton A “How far will the courts go in ensuring the right to basic education?” (2012) 27 *Southern African Public Law (SAPL)* 392.

¹¹³ Simbo (n 109 above) 164.

¹¹⁴ *Ibid.*

¹¹⁵ Simbo (n 109 above) 173.

¹¹⁶ S 3(1) of the Schools Act; Simbo (n 109 above) 173.

such acquisition.¹¹⁷ The Schools Act is in alignment with international law that acknowledges that the first few years of learning are the most important as this is when children are first exposed to basic education.¹¹⁸

The next level of enquiry should then focus on the meaning given to basic education when it was originally formulated. This should be a guide to the Constitutional Court when it is eventually faced with the task of determining what basic education means in the South African context.¹¹⁹ The term basic education finds its beginnings in the UNESCO World Declaration on Education for All¹²⁰ which states that basic education comprises of the following:

[B]oth essential learning tools (such as literacy, oral expression, numeracy and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs varies with individual countries and cultures, and inevitably, changes with the passage of time.¹²¹

Basic education is, therefore, the acquisition of basic learning needs necessary for a child to successfully and fully participate in society and their community.¹²² These basic learning needs are made up of what Simbo refers to as quality “essential learning tools and the basic learning content”.¹²³ It is significant to note that the World Declaration on Education for All acknowledges that the learning needs of persons with disabilities require special attention and that action should be taken to ensure that they have equal access to education.¹²⁴ The provision of equal access to education for persons with disabilities should be considered an “integral part of the education system”.¹²⁵

¹¹⁷ Simbo (n 109 above) 174.

¹¹⁸ Simbo (n 109 above) 174; General Comment 13 (n 2 above) para 9.

¹¹⁹ Veriava & Cooman (n 62 above) 63.

¹²⁰ United Nations Educational, Scientific, Cultural Organisation (UNESCO) “World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs” (1990) (the World Declaration on Education for All).

¹²¹ The World Declaration on Education for All (n 120 above) article 2.

¹²² *Ibid.*

¹²³ Simbo (n 109 above) 176.

¹²⁴ The World Declaration on Education for All (n 120 above) article 3.

¹²⁵ *Ibid.*

The World Declaration on Education for All also acknowledges that primary education¹²⁶ is the main delivery mechanism for basic education.¹²⁷ There must, therefore, be a universal safeguard for children's acquisition of basic learning needs.¹²⁸ Primary education needs to take into consideration the culture as well as the needs and opportunities of the communities that children are in.¹²⁹

The United Nations Committee on Economic, Social and Cultural Rights takes a step further. The Committee notes that even though the precise and appropriate application of the right to education is dependent on the context and conditions in a state, education, including basic education, must as a rule exhibit the following features:

- Availability: Sufficient functioning educational institutions and programmes must be made available by the state;
- Accessibility: The state must ensure that educational institutions are accessible to all without discrimination of any kind. Education must be physically accessible meaning that children must be able to access schools that are in convenient locations or through modern technology. Education must also be economically accessible or affordable to all that want to access it;
- Acceptability: The curricula, teaching methods and other related mechanisms for providing education must be acceptable; and
- Adaptability: The education system must be flexible enough to adapt and respond to diverse needs of children that come from different social and cultural contexts.¹³⁰

These characteristics will be used later in this chapter to measure South Africa's implementation of basic education for children with disabilities.¹³¹ So far this chapter has highlighted the important place that education, with a particular focus on basic education, for children with disabilities has in international and regional instruments as well as in South African national law. All of the legal documents discussed

¹²⁶ Murungi notes that primary education is often understood to be "the first layer of formal schooling": Murungi (n 50 above) 3162.

¹²⁷ The World Declaration on Education for All (n 120 above) article 5.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ General Comment 13 (n 2 above) para 6.

¹³¹ Para 3.4.1 below.

undoubtedly protect children with disabilities' right to basic education. The material question however is: What does this mean for children with disabilities in South Africa and how is it reflected in their life experiences?

Answering the above question will be the focus of the rest of the chapter and will begin with a brief discussion on the concept "inclusive basic education"; a title borrowed from Murungi.¹³²

3.4 INCLUSIVE "BASIC" EDUCATION IN SOUTH AFRICA AND APPLICABLE POLICY

While it is recognised, by international and regional law as well as the Constitution and the Schools Act, that all children have the right to basic education, it is also acknowledged that there are marginalised groups of children that are vulnerable to exclusion in their access to basic education, such as children with disabilities.¹³³ Therefore, policies must be formulated that ensure that education systems are inclusive and provide basic education in a manner that meets the needs of all learners.¹³⁴

In July 2001, the South African Ministry of Education produced the "Education White Paper 6: Special Needs Education – Building an Inclusive Education and Training System" (White Paper 6). White Paper 6 is government's way of responding to the education needs of children with disabilities and combating the legacy of discrimination left by the apartheid system in the "special needs" education sector.¹³⁵ As discussed in chapter 2 of this dissertation the apartheid education system discriminated against persons with disabilities, including children with disabilities, on two fronts, namely race and disability.¹³⁶ The schools that white children with disabilities attended were well-resourced and the few that were available to black children with disabilities were under-resourced.¹³⁷

¹³² Murungi (n 50 above) 3171.

¹³³ Murungi (n 50 above) 3166.

¹³⁴ *Ibid.*

¹³⁵ Department of Education "Education White Paper 6: Special Needs Education – Building an Inclusive Education and Training System" (2001) 9 (White Paper 6).

¹³⁶ See para 2.3.1 of above; White Paper 6 (n 135 above) 9.

¹³⁷ *Ibid.*

White Paper 6 seeks to transform the education system into an inclusive one taking into account the diverse learning needs of all children, particularly children with disabilities.¹³⁸ A discussion will follow on the content of White Paper 6 and its implementation. Firstly, however, it is important to determine precisely what inclusive basic education is.

3.4.1 Inclusive basic education

When it is accepted that basic education entails the acquisition of basic learning needs essential for a child to successfully function to their fullest potential (and that this is done through the use of basic learning tools and learning content),¹³⁹ the question then becomes: what does inclusive basic education entail?

There is no universally accepted definition of what inclusive basic education is, however the following broad definition has been given by the World Health Organisation and the World Bank:

[T]he education of children, including those with disabilities, should be under the responsibility of the education ministries or their equivalent with common rules and procedures. In this model, education may take place in a range of settings such as special schools and centres, special classes, special classes in integrated schools or regular classes in mainstream schools, following the model of the least restrictive environment.¹⁴⁰

This definition stresses that all children can and should learn and that this can be done in different settings as long as the curriculum used relates to their contexts and needs and produces significant outcomes.¹⁴¹ It is submitted that this essentially refers to the acquisition of basic needs essential to effective participation in society.

The narrow definition that is given to inclusive education is the following:

[A]ll children with disabilities should be educated in regular classrooms with age-appropriate peers... [it] entails identifying and removing barriers and providing

¹³⁸ Murungi (n 50 above) 3171.

¹³⁹ Para 3.2.2.1 above.

¹⁴⁰ World Health Organisation (WHO) & The World Bank "World Report on Disability" (2011) 209; Murungi (n 50 above) 3167.

¹⁴¹ WHO & The World Bank (n 140 above) 209.

reasonable accommodation, enabling every learner to participate and achieve within mainstream settings.¹⁴²

It is submitted that this narrow definition also accepts that children with disabilities can and should learn. It, however, also makes integration a central element of inclusive education.¹⁴³ Integration focuses on location and makes incorporation into mainstream schools a priority.¹⁴⁴ It is argued that this definition also leaves the option open for personal choice to make use of special schools and other special assistance.¹⁴⁵ This definition seems to be supported by the CRPD in article 24(2) which provides that individual requirements should be reasonably accommodated and support provided in the general education system in order to facilitate effective education.¹⁴⁶

White Paper 6 provides that inclusive education is about: recognising that all children have the ability to learn as long as they are provided with the necessary support; transforming the education system to recognise and accommodate diverse learning needs; and equipping mainstream schools and personnel to identify children experiencing learning barriers and providing them with the necessary support.¹⁴⁷ It places a priority on children with disabilities accessing education through mainstream schools.¹⁴⁸ White Paper 6 also acknowledges that there are some children that require intensive and specialised support in order to reach their full potential.¹⁴⁹ It therefore provides that children that require “low-intensive” or low levels of support should be in mainstream schools.¹⁵⁰ Children that require moderate support should be in full-service schools and children that require “high-intensive” or high levels of support should be in special schools.¹⁵¹ This seems to advance the narrow definition of inclusive education.¹⁵²

¹⁴² WHO & The World Bank (n 140 above) 209-210.

¹⁴³ Murungi (n 50 above) 3170.

¹⁴⁴ Murungi (n 50 above) 3169-3170.

¹⁴⁵ The United Nations Education, Scientific and Cultural Organisation (UNESCO) “Guidelines for Inclusion: Ensuring Access to Education for All” (2005) 15.

¹⁴⁶ Murungi (n 50 above) 3170; para 3.1.3 above.

¹⁴⁷ White Paper 6 (n 135 above) 24.

¹⁴⁸ Murungi (n 50 above) 3171.

¹⁴⁹ White Paper 6 (n 135 above) 16.

¹⁵⁰ White Paper 6 (n 135 above) 15.

¹⁵¹ *Ibid.*

¹⁵² Murungi (n 50 above) 3172.

White Paper 6 states in further detail that inclusive education is about, inter alia, the following:

- Acknowledging that all children can learn and need support;
- Accepting and respecting the fact that all children are different with different learning needs which must be equally valued as a normal part of the human experience;
- Equipping and changing education structures, systems and learning practises to meet the needs of all children. Changing attitudes and behaviour too;
- Acknowledging that inclusive education is not just in the formal school setting but learning can also happen in the home and the community;
- Maximising the participation of children in the culture and curricula of educational settings and reducing barriers to learning; and
- Empowering children through the development of their individual strengths and assisting them to participate in the learning process.¹⁵³

3.4.2 White Paper 6 and the implementation of inclusive basic education

White Paper 6 envisions an education system that addresses a number of learning needs resulting from factors such as physical, mental, sensory, neurological and developmental impairments as well as psycho-social disabilities.¹⁵⁴ The learning needs can be as a result of barriers that include the following:

- Negative and stereotypical attitudes;
 - Curriculums that are not flexible to the needs of all children;
 - Language or languages and/or communication that is not appropriate for children's different needs;
 - Physical structures or buildings that are not accessible or safe;
 - Support structures that are inappropriate or inadequate;
 - Legislation and/or policies that do not address different needs adequately;
- and

¹⁵³ White Paper 6 (n 135 above) 16.

¹⁵⁴ White Paper 6 (n 135 above) 17.

- Education managers and teachers that are not trained properly.¹⁵⁵

White Paper 6 states that these barriers can be addressed in different ways to ensure that they do not hinder and make learning ineffective.¹⁵⁶ One of these ways is through targeting the development of educator's skills and knowledge on, inter alia, multi-level classroom instruction¹⁵⁷ to respond to individual needs of learners; co-operative learning; curriculum enhancement; and dealing with children with behavioural difficulties.¹⁵⁸

Special schools will also be equipped to provide quality education to children that require intensive support.¹⁵⁹ This includes comprehensive education programmes on life-skills training and programme-to-works linkages.¹⁶⁰ Special schools will be equipped to carry out the task of being resource centres through the qualitative upgrading of their services and training of staff on and for this task.¹⁶¹ These schools will also provide specialised support services on curriculum development and assessment and instruction, to neighbourhood schools including "full-service" schools.¹⁶² Full-service schools are schools equipped and supported to provide for the full range of learning needs of all children and therefore address barriers to learning.¹⁶³

The aim of White Paper 6 is to designate and convert 500 out of 20 000 mainstream schools to "full-service" schools.¹⁶⁴ The process would begin with 30 school districts

¹⁵⁵ White Paper 6 (n 135 above) 18.

¹⁵⁶ *Ibid.*

¹⁵⁷ "Multi-level instruction is the process of teaching one primary objective or concept to the class while allowing for varying outcomes for an individual student or a small group of students. In other words, multi-level instruction allows teachers to deliver on-grade level, standards-based instruction to an entire class, but when appropriate, to respond to any student who may require instruction whether below or beyond the current learner objective." Inclusive Schools Network "Using multi-level instruction for a classroom of diverse learners" 4 November 2011 <http://inclusiveschools.org/using-multi-level-instruction-for-a-classroom-of-diverse-learners/#sthash.c9rQHRGg.dpuf> (accessed 19 January 2016).

¹⁵⁸ *Ibid.*

¹⁵⁹ White Paper 6 (n 135 above) 21.

¹⁶⁰ *Ibid.* Programme-to-works linkages allow children with disabilities who have challenges with the classroom based curriculum can be taught practical skills. Partnerships between education and the specific industries should aim to facilitate job accessibility for the children once skills have been taught and acquired (see White Paper 6 (n 135 above) 17).

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ White Paper 6 (n 135 above) 22.

that form part of the national District Development Programme.¹⁶⁵ This will be done by, inter alia, developing flexible teaching practices and styles through training, capacity building and provision of support to learners and educators.¹⁶⁶

White Paper 6 indicates that a realistic timeframe for the implementation of inclusive education is 20 years.¹⁶⁷ It breaks it down into three phases that include immediate to short-term steps (2001 to 2003); medium-term steps (2004 to 2008) and long-term steps (2009 to 2021).¹⁶⁸

The short-term to medium-term steps deal with immediately addressing weaknesses and deficiencies in the education system and expanding access to children of compulsory school-going age not accommodated in the education system.¹⁶⁹ It is submitted that this last point is particularly interesting and concerning given the fact that, as discussed earlier, the Minister has not determined ages of compulsory attendance for learners with special education needs.¹⁷⁰ The long-term steps deal with the development of an inclusive education system that exposes and addresses barriers to learning and also recognises and accommodates diverse learning needs.¹⁷¹

It should be noted that this phased-in approach to the implementation of inclusive basic education has been criticised for making inclusive basic education progressively realisable instead of immediately realisable.¹⁷² It has been suggested that such approach is unreasonable as it would require children with disabilities to wait 20 years for suitable and quality education while children without disabilities can demand basic education to be immediately realisable.¹⁷³ Murungi argues that such an approach is out of step with the Constitution and international human rights instruments.¹⁷⁴ It is submitted that this argument should be contemplated by the Constitutional Court as such interpretation could be detrimental to fulfilling the rights of children with disabilities.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ White Paper 6 (n 135 above) 42.

¹⁶⁸ White Paper 6 (n 135 above) 42-43.

¹⁶⁹ White Paper 6 (n 135 above) 45.

¹⁷⁰ Para 3.2.2 above.

¹⁷¹ White Paper 6 (n 135 above) 45.

¹⁷² Murungi (n 50 above) 3175.

¹⁷³ Murungi (n 50 above) 3177.

¹⁷⁴ Murungi (n 50 above) 3181.

What follows is a discussion on the actual implementation of White Paper 6 to ensure that children with disabilities have access to an inclusive basic education. The focus will be on how far South Africa has come in the implementation of White Paper 6. The challenges or issues that still have to be addressed in order to ensure an inclusive basic education system will also be touched on.

3.5 A BIRD'S EYE VIEW OF THE IMPLEMENTATION OF WHITE PAPER 6 AND INCLUSIVE BASIC EDUCATION

South Africa has over the past few years made noticeable progress in its implementation of White Paper 6 and is therefore making strides in the implementation of inclusive basic education for children with disabilities.

The Department of Basic Education reports an increase in the number of enrolment of children in special schools from 108 240 in 2011 to 116 888 in 2013.¹⁷⁵ In 2011 there were a reported 423 special schools in the country and reports submitted to the Department by provinces in 2015 indicate 436 special schools.¹⁷⁶ In 2012 the number of children that were enrolled in mainstream public schools was 123 418.¹⁷⁷ In 2013 there were 76 993 children enrolled, one notices a drop in numbers between the two years.¹⁷⁸ The Department attributes this possibly arising from schools not accurately identifying and recording children with disabilities.¹⁷⁹

The Department further reports that in 2014 there were a total of 793 full-service schools in the country with 24 724 children attending these schools.¹⁸⁰ This an increase from 553 full-service schools in 2013.¹⁸¹ According to figures received by the Department, from different provincial offices, approximately 29 000 teachers were trained on different inclusive education related activities such as guidelines for

¹⁷⁵ Department of Basic Education "Report on the implementation of Education White Paper 6 on inclusive Education: An overview for the period 2013-2015" (2015) 11-12.

¹⁷⁶ Martin (n 87 above) 136; Department of Basic Education (n 175 above) 17.

¹⁷⁷ Department of Basic Education (n 175 above) 13-14.

¹⁷⁸ *Ibid.*

¹⁷⁹ Department of Basic Education (n 175 above) 14.

¹⁸⁰ Department of Basic Education (n 175 above) 17.

¹⁸¹ Martin (n 87 above) 136.

full-service schools; curriculum differentiation;¹⁸² South African Sign Language; and Braille.¹⁸³

The Department has also published guidelines to support and assist in the implementation of White Paper 6, these include: Guidelines to Ensure Quality Education and Support in Special Schools (2007); Guidelines for Responding to Learner Diversity in the Classroom (2008); Guidelines for Full Services and Inclusive Schools (2010); Guidelines for Responding to Learner Diversity in the Classroom (2011); and Policy on Screening, Identification, Assessment and Support, SIAS (2014).¹⁸⁴

Despite these noticeable measures taken to ensure the advancement of inclusive basic education in South Africa, children with disabilities still form a large number of out-of-school children in the country.¹⁸⁵ The challenges that children with disabilities are faced with will be discussed below.

3.5.1 The current implementation challenges affecting children with disabilities

It has been reported that there is an estimated number of 597 953 children with disabilities who are out of school and approximately 25,7 per cent of these are children who are between the ages of 5 to 15.¹⁸⁶ This age group includes children which the Schools Act states must attend school, namely those that are aged between 7 and 15 (or ninth grade).¹⁸⁷ These numbers, however, do not paint an accurate depiction of the extent of the exclusion due to the inadequate tracking of children with disabilities.¹⁸⁸ These implementation challenges will be discussed with the use of the characteristics or essential features of education developed by the

¹⁸² Curriculum differentiation is the “process of modifying or adapting the curriculum according to the different ability levels of the students in one class. Teachers can adapt or differentiate the curriculum by changing: the content, methods for teaching and learning content ... and, the methods of assessment”. See United Nations Educational, Scientific, and Cultural Organisation “Changing Teaching Practices: Using curriculum differentiation to respond to student’s diversity” (2004) 14.

¹⁸³ Department of Basic Education (n 175 above) 36.

¹⁸⁴ Martin (n 87 above) 135; Catholic Parliamentary Liaison Office “Briefing Paper 396: Inclusive Education: Are we there yet?” (2015) 3.

¹⁸⁵ Martin (n 87 above) 137; Human Rights Watch (n 65 above) 2.

¹⁸⁶ Department of Basic Education (n 175 above) 21; Schools Act s 3(1).

¹⁸⁷ *Ibid.* This is not in line with the CRPD which encourages the collection of information such as statistical and research data to assist in the improvement of the implementation of laws, policies and services for persons, and children with disabilities (see para 1.1.5 above).

¹⁸⁸ Martin (n 87 above) 137.

Committee on Economic, Social and Cultural Rights: availability, accessibility, acceptability and adaptability.¹⁸⁹

3.5.1.1 Availability

There are currently not enough special schools or full-service schools with appropriate facilities to meet the special needs of all children with disabilities that need to access basic education.¹⁹⁰ Special schools have long waiting lists and do not take children with severe and profound disabilities.¹⁹¹ It is said that in 2014 there were 5552 children on special school waiting lists.¹⁹² The Department of Basic Education estimates that in order to accommodate 597 953 children at least 2300 additional schools would have to be built.¹⁹³

The issue is further exacerbated by the fact that there are high-numbers of incorrect referrals of children with disabilities to special schools instead of being reasonably accommodated in mainstream schools.¹⁹⁴ Children are often referred to special schools based on assessments that focus on their disability and not on their abilities and level of support needed to learn in mainstream schools.¹⁹⁵ As a result children who can learn in mainstream schools being denied this opportunity.¹⁹⁶ Children who do need to access special schools are excluded from the schools because children who are incorrectly referred there have settled in the schools and there is no room for more children in the schools.¹⁹⁷

3.5.1.2 Accessibility

Accessibility refers to the fact that the state must ensure that schools are accessible to all without discrimination of any kind.¹⁹⁸ The reality is that for children with disabilities a number of discriminatory barriers still exist that hinder their access to basic education.

¹⁸⁹ These features are discussed in para 3.2.2.1 above.

¹⁹⁰ Martin (n 87 above) 137.

¹⁹¹ *Western Cape Forum for Intellectual Disability v The Government of the Republic of South Africa* 2011 (5) SA 87 (WCC) para 3; Martin (n 83 above) 137.

¹⁹² Department of Basic Education (n 175 above) 22.

¹⁹³ Department of Basic Education (n 175 above) 21.

¹⁹⁴ Martin (n 87 above) 137.

¹⁹⁵ Human Rights Watch (n 65 above) 34.

¹⁹⁶ Martin (n 87 above) 137.

¹⁹⁷ Martin (n 87 above) 138.

¹⁹⁸ See para 3.2.2.1 above.

Children with disabilities often struggle to access schools, particularly mainstream schools, due to the fact that the proper infrastructure is lacking.¹⁹⁹ In a 2006 study it was shown that of 25,156 mainstream schools 97,1 per cent did not have wheelchair accessible toilets and that 97,8 per cent did not have ramps.²⁰⁰ This creates a sense of dependence and despondence amongst children with disabilities, hampering their ability to fully gain from the education received.²⁰¹

Children with disabilities are also not able to access schools that can accommodate them due to a lack of transport, particularly if the schools are far away from their homes and making use of public transport is unaffordable.²⁰² Children with disabilities who are refused access to mainstream schools close to them have to travel 30 to 100 km to access other schools.²⁰³ There is currently no learner transport policy that caters for children with disabilities.²⁰⁴

A major and complex issue relating to the accessibility of inclusive basic education is the payment of school fees.²⁰⁵ It has been argued that even though the Constitution does not explicitly guarantee free basic education, it does not prevent the provision of free education and implies therefore that no-one should be barred from accessing basic education as a result of an inability to pay fees.²⁰⁶ The poorest schools in the country are allocated funds from provincial departments as recompense for their inability to charge fees.²⁰⁷ Other schools are allowed to charge fees and exemptions are granted to parents who cannot afford to pay the fees.²⁰⁸ It is argued that South

¹⁹⁹ Human Rights Watch (n 65 above) 45; Martin (n 87 above) 138.

²⁰⁰ Martin (n 87 above) 138.

²⁰¹ Human Rights Watch (n 65 above) 45.

²⁰² Martin (n 87 above) 138; Human Rights Watch (n 65 above) 28. An interesting point to note that even if they are able to pay the fares, will there be somebody provided to assist them getting into and out of bus?

²⁰³ Human Rights Watch (n 65 above) 28; Department of Women, Children and People with Disabilities "Baseline country report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities in South Africa" (2013) 44.

²⁰⁴ Human Rights Watch (n 65 above) 28; Department of Women, Children and People with Disabilities (n 203 above) 44.

²⁰⁵ Veriava & Coomans (n 62 above) 68; Liebenberg (n 62 above) 245.

²⁰⁶ Veriava & Coomans (n 62 above) 69.

²⁰⁷ Liebenberg (n 62 above) 246.

²⁰⁸ Veriava & Coomans (n 62 above) 86. See Veriava & Coomans for a detailed explanation of how this fee regulatory framework is designed.

Africa is in this respect not in compliance with international and regional law which requires education, particularly at the primary level, to be free and compulsory.²⁰⁹

The situation of payment of fees is further aggravated for children with disabilities who have to access public special schools.²¹⁰ It has been reported that the families of many children with disabilities that attend public special schools have to pay fees on top of costs relating to uniforms, food and transport.²¹¹ There are no public special schools that have been designated as ‘no-fee’ schools despite the fact that a large number of children in special schools are predominately from poor families.²¹² Many public special schools are actually located in urban areas with income levels that do not meet the needs or the poverty test used to designate schools as ‘no-fee’ schools.²¹³ Parents of children with disabilities are often not knowledgeable about the fact that they can be exempted from paying fees or often find that the process of obtaining such exemption is onerous.²¹⁴

3.5.1.3 Acceptability

The implementation of inclusive basic education is hindered by a lack of skilled teachers with the knowledge and ability to modify the curriculum in order to accommodate different learning needs.²¹⁵ The Department of Basic Education acknowledges that it is concerned about the standard of curriculum delivery in special schools.²¹⁶ The Department notes that special schools seem to have become “day care centres with little attention being given to ensuring that [the children] have access to the National Curriculum Statement on an equal basis with all other [children] in the system”.²¹⁷

Teachers in mainstream and full-services schools are also not adequately equipped and have been found to lack the appropriate knowledge and skills to teach children

²⁰⁹ See para 3.1.1 above for provisions in the CRC and para 3.1.2 for provisions in the ACRWC that talk to the provision of free and compulsory primary education; Veriava & Coomans (n 62 above) 70.

²¹⁰ Human Rights Watch (n 65 above) 23.

²¹¹ Human Rights Watch (n 65 above) 24.

²¹² Human Rights Watch (n 65 above) 24-25.

²¹³ Human Rights Watch (n 65 above) 25.

²¹⁴ Human Rights Watch (n 65 above) 26.

²¹⁵ Martin (n 87 above) 138.

²¹⁶ Department of Basic Education (n 203 above) 34.

²¹⁷ *Ibid.*

with disabilities.²¹⁸ Teachers are also not provided with the necessary support in the form of occupational therapists, speech therapists and others because there are not enough that have been employed to provide the assistance needed.²¹⁹

This results in children not acquiring necessary skills such as reading and writing despite being in school.²²⁰ Teachers do not engage with children with disabilities because they do not know how to.²²¹ Children are also labelled as, inter alia, “acting out” and being “slow learners”; there is a lack of individualised learning and planning and inappropriate grade transition.²²²

3.5.1.4 Adaptability

The adaptability characteristic places an obligation on the state and society to ensure that the education system is inclusive, flexible and responsive to the needs of children with disabilities.²²³ The above, and other challenges experienced by children with disabilities,²²⁴ point to the fact that South Africa’s inclusive basic education system still has a long way to go to ensure that it is available, accessible and acceptable for children with disabilities.²²⁵

Martin summarises all of these challenges experienced by children with disabilities by noting that they relate to implementation challenges; lack of resources; and inadequate information management resulting in the inability to monitor or measure disability appropriately.²²⁶ She also notes the non-existence of laws that compel appropriate allocation and use of resources and appropriate conduct by parents, teachers, schools and others.²²⁷ Martin notes in further detail the following reasons for the frustration that children with disabilities experience in their access to basic education:

²¹⁸ Human Rights Watch (n 65 above) 54.

²¹⁹ Human Rights Watch (n 65 above) 55.

²²⁰ Human Rights Watch (n 65 above) 54-65.

²²¹ *Ibid.*

²²² *Ibid.*

²²³ Martin (n 87 above) 133.

²²⁴ Due to space constraints this chapter could not delve into further detail on the challenges faced by children with disabilities in their access to inclusive basic education. For more information see the Human Rights Watch report (n 65 above) as a whole as well as Martin’s chapter (n 87 above).

²²⁵ Martin (n 87 above) 133.

²²⁶ Martin (n 87 above) 139.

²²⁷ *Ibid.*

- Funding allocated to inclusive education is insufficient: The budget structure used by National Treasury only makes provision for special schools and not inclusive education in mainstream schools. The Department of Basic Education does not have funding norms and standards that place an obligation on provinces on how they should allocate funding for the implementation of inclusive education;
- White Paper 6 is not being implemented in the designed timeframes. The scale of implementation is very slow with the first phase being implemented from 2002 to 2008 instead of the intended timeframe of 2001 to 2003. The second phase was implemented between 2009 and 2012 instead of the intended 2004 to 2008. The last phase is expected to be implemented between 2012 to 2021, instead of 2009 to 2021. Given the delays already experienced the author wonders whether the deadline of 2021 will be met;
- Inclusive basic education is contained in White Paper 6 which is a “broad statement of government policy” document and not law. It is therefore difficult to hold government to account in its implementation of a “broad statement of policy”. The White Paper 6 is not supported by appropriate laws, norms and standards and relevant regulations;
- A compulsory age for school attendance²²⁸ for children with disabilities has not been set as required in section 3(2) of the Schools Act; and
- Even though the White Paper 6 requires children with severe and profound intellectual disabilities to be taught at special schools this does not happen in practice.²²⁹

The Western Cape High Court gave a judgment on right of children with severe and profound intellectual disabilities to access education. This judgment will be discussed below as a case study on the challenges that children with disabilities are experiencing.

²²⁸ Para 3.2.2 above, discusses compulsory age of school attendance.

²²⁹ Martin (n 87 above) 141-142.

3.5.2 Jurisprudence arising from the right of children with disabilities to inclusive basic education

The Western Cape High Court handed down a judgment in 2010 that dealt with the state's failure to provide and fund education for children with severe and profound intellectual disabilities. It found that this was in contravention of the right to basic education.

3.5.2.1 *Western Cape Forum for Intellectual Disability v The Government of the Republic of South Africa*²³⁰

a) Facts

The Western Cape High Court was asked to hear a matter that dealt with the rights of children with severe and profound intellectual disabilities in the Western Cape.²³¹ The matter was brought by the Western Cape Forum for Intellectual Disability (the Western Cape Forum) a body corporate that is made up of non-governmental organisations that care for children with severe and profound intellectual disabilities.²³²

It was argued that children with severe and profound intellectual disabilities (having IQ levels of 20-35 and less than 20 respectively) are not provided with education by the state.²³³ They are only able to receive education at special-care centres run by non-governmental organisations including members of the Western Cape Forum. Children who are not able to access the centres receive no education at all.²³⁴ The Centres themselves are not able to cater for all children with severe and profound intellectual disabilities.²³⁵ The only support the state provided to these centres was a subsidy that was inadequate to meet the children's educational needs.²³⁶ The financial support provided to the centres was far less than that given to other children.²³⁷

²³⁰ 2011 (5) SA 87 (WCC)

²³¹ *Western Cape Forum* para 1.

²³² *Western Cape Forum* para 2.

²³³ *Western Cape Forum* para 3.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

The Western Cape Forum argued that this infringed on the right of children with severe and profound intellectual disabilities whose needs are much greater than those of other children.²³⁸ The rights infringed include the right to basic education, the right to equality, the right to human dignity and the right to be protected from neglect and degradation.²³⁹

The state argued that the existence of White Paper 6 and the National Strategy on Screening, Identification, Assessment and Support (SIAS) showed that it was working on improving the situations faced by the children in question.²⁴⁰ Children with severe and profound intellectual disabilities who did not qualify to be admitted in special schools in terms of the strategy could then not benefit from any amount of education and had to rely on skills taught by their parents.²⁴¹ The Western Cape Forum refuted this argument and provided evidence that showed that the children could benefit from education and training and this view is accepted by the international community.²⁴²

The state also argued that the rights of the children should not be seen in isolation but together with other rights that the state needs to provide to all, such as the right to housing, food, water, healthcare and electricity.²⁴³ The state only has limited resources which need to be distributed to meet other needs and the right to education of the affected children should not trump the other rights.²⁴⁴

b) Judgment

The court discussed the right to basic education as set out in section 29(1)(a) of the Constitution. It confirmed that the right has two dimensions; a positive one which requires that education be provided to everyone and a negative one which provides that the right to basic education must not be obstructed.²⁴⁵

²³⁸ *Western Cape Forum* para 4.

²³⁹ *Ibid.* See para 2.4 above, for a discussion on dignity and equality.

²⁴⁰ *Western Cape Forum* para 17.

²⁴¹ *Ibid.*

²⁴² *Western Cape Forum* para 18.

²⁴³ *Western Cape Forum* para 17.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.* Para 3.2.1 above highlights this.

The court then looked at the defence given by the state that it only has limited resources and can therefore not afford further expenditure on education.²⁴⁶ The defence argued that such failure to provide education is justifiable because there is a rational connection to a legitimate government purpose to meet other needs.²⁴⁷ The court was of the view that such defence was misplaced and it did not explain why the affected children had been singled out and treated in a manner less favourable than other children.²⁴⁸ The court also questioned why the effects of the state having limited resources are not felt to the same extent by other children.²⁴⁹ The court acknowledged that the Western Cape Forum did not ask that the affected children be provided with extra financial support, they only asked that available funds be spread out fairly to all children, including children with severe and profound intellectual disabilities.²⁵⁰

The court then went on to determine if the failure to provide education to the children was justifiable in terms of section 36 of the Constitution.²⁵¹ Section 36 provides that rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable.²⁵² The following factors must be taken into account: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.²⁵³

The court held that when one examines legislation that relates to and deals with the right to education it can be seen that none of them contain provisions that allow and justify the infringement of the right to education.²⁵⁴ The fact that they are laws of general application does not automatically justify the infringement of the rights protected.²⁵⁵ The infringement must be contained in the law of general application.²⁵⁶

²⁴⁶ *Western Cape Forum* para 26.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Western Cape Forum* para 30.

²⁵¹ *Western Cape Forum* para 31.

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Western Cape Forum* paras 33-40.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

The court's final decision was that the state had failed to take reasonable steps to provide children with severe and profound intellectual disabilities with the required educational needs.²⁵⁷ The state, therefore, breached the constitutional rights of the children to basic education, equality, human dignity and protection from neglect or abuse.²⁵⁸ The court ordered the Department to carry out the following steps:

- Ensure that the affected children have affordable access to basic education of an adequate quality;
- Provide adequate financial assistance to organisations providing the affected children with basic education;
- Provide adequate transport services to the children to and from the special-care centres; and
- Enable the staff at the centres to receive the necessary training, accreditation and compensation.²⁵⁹

c) Implications of the case

There are 3 important implications that arise from this case that have been identified by Murungi:

- Even though the state depends on non-governmental organisations to provide access to education for children with severe and profound intellectual disabilities it is not absolved from its constitutional duty to provide education to the children;
- It cannot be denied that the state does have other obligations, however the right to basic education should be a priority when resources are being allocated; and
- Even though the education of children with severe and profound intellectual disabilities, and other children with disabilities, is sometimes provided outside the "regular schools" their education must still form part of the mainstream education planning.²⁶⁰

²⁵⁷ *Western Cape Forum* para 52.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ Murungi N "The duty to provide basic education for children with severe and profound intellectual disabilities: Case review" (2011) 12 *ESR Review: Economic and Social Rights in South Africa* 10 11. For further discussions on the case see Kruger P "A critical appraisal of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC)" (2015) *Potchefstroom Electronic Law Review (PER)* 756-773.

3.6 RECOMMENDATIONS AND CONCLUSION

As seen in the discussion on the challenges to implementation of White Paper 6 and *Western Cape Forum*, the process of practical implementation of inclusive basic education is slow and in dire need of improvement. Even though progress has been made in the implementation of inclusive basic education, many children with disabilities still remain out of school. Many children with disabilities who are in mainstream schools, special schools or full-service schools find themselves in less than desirable situations due to, inter alia, a lack of training of teachers, poor curriculum development, poor school infrastructure and the lack of services provided by support staff like occupational therapists.

In the light of the above discussions on the challenges to implementation, the following recommendations are made to ensure the improvement of access to inclusive basic education for children with disabilities:

- White Paper 6 was developed 10 years ago and is outdated. It has to be reviewed to ensure that it is up to date and takes into account the fact that implementation cannot be done at a slow pace anymore;
- White Paper 6 should be given more influence through its translation into a comprehensive law that will bind national and provincial governments;
- It should be ensured that section 3(2) of the Schools Act is complied with by determination of compulsory school going ages for children with disabilities;
- There should be an increase in training of teachers, other personnel and government officials on the implementation of the White Paper 6;
- It should be ensured that norms and standards for the funding of inclusive education are published. These norms and standards should not just deal with strengthening special schools but also ensuring the mainstream schools provide the infrastructure, skilled personnel and equipment to provide appropriate support to children with disabilities;
- A learner transport policy should be developed that ensures that children with disabilities have subsidised transport to and from school;
- Necessary resources should be provided to ensure that schools are able to accurately account for the number of children with disabilities; their grade levels, progressions and drop-outs;

- The determination of minimum qualifications for teachers in special schools should be ensured; and
- Norms and standards for infrastructure to provide guidance on what is required of all schools, in terms of infrastructure, learning and teaching support material should be strengthened.²⁶¹

It is submitted that as highlighted earlier in this chapter it is important to note that the Constitutional Court will have to deliberate and decide on the constitutionality of the progressive nature of the implementation of the White Paper 6, and therefore inclusive basic education.²⁶² The Court will have to determine whether this progressive nature is in compliance with international and regional law standards and the Constitution. The Court should determine whether it is constitutionally sound to accept that the “right to basic education” is immediately realisable but inclusive basic education is subject to progressive realisation therefore differentiating between children and their needs.

²⁶¹ Human Rights Watch (n 65 above) 6-7; Martin (n 87 above) 143-144. For more reports on the struggle that children with disabilities face to access basic education see “No place for disabled children in KZN’s rural schools” *Mail & Guardian* 17 October 2014 <http://mg.co.za/article/2014-10-17-no-place-for-disabled-children-in-kzns-rural-schools> (accessed 05 November 2015); “Struggle continues for disabled children” *Mail & Guardian* 06 February 2015 <http://mg.co.za/article/2015-02-06-struggle-continues-for-disabled-children> (accessed 05 November 2015).

²⁶² Para 3.4.2 above, discusses the need for this to be resolved by the Constitutional Court.

CHAPTER FOUR: A SOCIAL SERVICES FAILURE – ALTERNATIVE CARE FOR CHILDREN WITH EMOTIONAL AND BEHAVIOURAL DIFFICULTIES

4.1 INTRODUCTION

Children make up a particularly vulnerable group in society due to, inter alia, their physical characteristics, special emotional and developmental needs and dependence on adults.¹ Special attention needs to be given to the individual needs of children and the manner in which these needs are met or fulfilled.² Children with disabilities are especially vulnerable and disadvantaged in a number of areas and are therefore in need of special protection.³ Social services exist to provide such protection to all children, including children with disabilities, in the various stages and different contexts of their lives.⁴ The state has the responsibility of ensuring that these needs are met through budgetary and related means.⁵

In addition to this, it is submitted that in order for a child to fully benefit from access to the right to basic education, as discussed in chapter 3, it is desirable that the environments they live in promote, develop and nurture their desire and ability to learn and acquire knowledge. Social services, if implemented appropriately, ensure that children's environments are conducive to their well-being, continued development and pursuit of ways, such as education, in which they can become contributing members of society.

The aim of this chapter is to reflect on South Africa's successes or shortcomings in its provision of social services to children with disabilities. This will be done, firstly, through a discussion on the definition given to and interpretation of social services. Drawing from the discussion on the definition of social services, applicable laws such as international and regional instruments as well as the Constitution and national

¹ Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 228-229.

² *Ibid.*

³ Liebenberg (n 1 above) 231-232.

⁴ *Ibid.*

⁵ Skelton A "Children" in Currie I & de Waal J *The Bill of Rights Handbook* (2013) 612.

legislation will be discussed. This provides the legal basis by which South Africa is held accountable for the provision of services to children with disabilities.

A more focused examination on the provision of social services to children with emotional and behavioural difficulties in alternative care will be carried out. This will be conducted as a case study indicating where South Africa is lacking and needs to improve greatly in its provision of social services to a group of children with psychosocial disabilities identified as a highly neglected and vulnerable group of children.⁶

4.2 DEFINING SOCIAL SERVICES

It is argued that the provision of and access to social services is one of the mechanisms used to ensure the fulfilment of the ultimate goal of social protection.⁷ The United Nations Special Rapporteur on the rights of persons with disabilities explains the aim of social protection in the following manner:

Social protection constitutes an essential condition for social and economic development for all. In fact, effective national social protection systems can contribute to building inclusive societies and social cohesion by protecting individuals from social risk and deprivation. They are not only a powerful instrument for providing income security and reducing poverty and inequality, but play an important role in enhancing human potential ...⁸

The Commission of Inquiry into a Comprehensive System of Social Security for South Africa also notes that comprehensive social protection:

[i]ncorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens ... [It focuses] on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State.⁹

⁶ Para 4.4 below.

⁷ Stewart L “Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others” (2008) 24 *South African Journal of Human Rights* 472 483.

⁸ The United Nations Special Rapporteur on the rights of persons with disabilities “Report of the Special Rapporteur on the rights of persons with disabilities on the right of persons with disabilities to social protection A/70/297” (2015) 4.

⁹ Department of Social Development “Transforming the present – Protecting the future: Report of the Commission of Inquiry into a Comprehensive System of Social Security for South Africa” (2002) 41; Stewart (n 7 above) 483.

The Commission notes that comprehensive social protection is not just made up of social insurance and social assistance but social services too.¹⁰ Liebenberg points out that the term social services can be given a narrow interpretation or a broad interpretation.¹¹ The narrow interpretation focuses on social welfare services provided and delivered by social workers in the employ of the Department of Social Development as well as non-governmental organisations (NGOs).¹² These services include services provided to child victims of all forms of abuse or neglect; services provided to children who have been temporarily or permanently separated from their families or other caregivers; and support services provided to children with disabilities.¹³ The broad interpretation entails a wider category of social services usually provided by the state.¹⁴ These services include, inter alia, health care, provision of water, sanitation and social security.¹⁵ They would encompass a variety of programmes delivered by different government departments not just the Department of Social Development.¹⁶ Liebenberg argues that the broad interpretation of the term better promotes the achievement of children’s wellbeing.¹⁷

Dutschke and Monson, however, argue that social services refer to a narrowly defined and specific group of social services.¹⁸ They argue that, as a result of jurisprudence arising from the Constitutional Court and commentary arising from legal analysis, social services relate to services that ensure the rights to care and protection of all children.¹⁹ Dutschke and Monson indicate that the jurisprudence and legal commentary show that the right to social services refers to services that promote family care; provide protection from abuse, neglect, maltreatment and degradation; ensure the wellbeing of children removed from their homes; and services for children with special needs.²⁰ This argument finds support in international and regional instruments as will be shown below. It is submitted, however, that the broader social services context does not automatically fall away

¹⁰ *Ibid.*

¹¹ Liebenberg (n 1 above) 232-233.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Dutschke M & Monson J “Children’s constitutional right to social services” in Proudlock P, Dutschke M, Jamieson L, Monson J & Smith C (eds) *South African Child Gauge 2007/2008* (2008) 23-25.

¹⁹ *Ibid.*

²⁰ Dutschke & Monson (n 18 above) 23-25.

when one looks at the provision of social services. These broader social services as emphasised by Liebenberg are ancillary or additional rights that must be fulfilled when the rights to social services are being fulfilled to ensure that children have well-rounded life experiences, access to other fundamentally protected rights like basic education and equality and non-discrimination.

The provision of social services for children is contained in different legal documents including international instruments.²¹ It has been averred that international instruments do not contain definitions of the term social services, the CRC and ACRWC in particular, as instruments focusing on children's rights, do not make use of the term in their provisions.²² The CRC and ACRWC do however provide for children's right to family care, alternative care and their right to be protected from maltreatment, abuse, neglect or degradation and their right to equality which calls for services to children in especially vulnerable situations.²³ This points to the fact that social services for children, including children with disabilities, are designed to ensure their care and protection.²⁴ Social services are designed to ensure that all children have the "minimum decencies of life to live with human dignity".²⁵

The Constitution and national legislation, namely the Children's Act 38 of 2005, also provide for social services for all children.²⁶ The envisaged role of social services is to "help children and their caregivers [to] deal with social problems arising out of social, political, or economic circumstances in order to promote the overall welfare of the community".²⁷ The discussions to follow will deal specifically with provisions in international and regional instruments as well as the Constitution and the Children's Act.

4.3 INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

International and regional instruments, particularly the CRC, the ACRWC and the CRPD, make provision for the protection and promotion of the rights and wellbeing of

²¹ Dutschke & Monson (n 18 above) 25; Stewart (n 7 above) 484.

²² Dutschke & Monson (n 18 above) 25.

²³ Dutschke & Monson (n 18 above) 24-25. See page 24 of Dutschke & Monson (n 18 above) for a table that provides examples of social services that are recommended by the CRC.

²⁴ Dutschke and Monson (n 18 above) 24-25; Stewart (n 7 above) 484.

²⁵ Stewart (n 7 above) 484.

²⁶ Dutschke M "Defining children's constitutional right to social services" (2007) Children's Institute *Rights in Brief* 3, 10.

²⁷ Dutschke (n 26 above) 3.

children with disabilities. This includes children with disabilities that are accessing or who are supposed to be accessing appropriate social services. Chapter 2 of this dissertation has already pointed to a number of applicable rights and principles such as the right not to be discriminated against and respect for the human dignity of children with disabilities.²⁸ Other rights and principles include the promotion of their inclusion and participation in their communities and society; and the recognition of the growing capacities of children with disabilities.²⁹ All of these point to the establishment of enabling environments for children with disabilities something that social services play a big role in developing as pointed out in the introduction to this chapter.³⁰ The discussion below will briefly revisit these rights for purposes of highlighting them within the context of the right to social services. The discussion will also go into further detail on additional provisions particularly applicable when children with disabilities want to enforce their right to access social services.

4.3.1 The United Nations Convention on the Rights of the Child, 1990

In addition to calling for the best interests of a child to be a primary consideration in all matters concerning them,³¹ article 3 of the CRC requires states to take all legislative and administrative actions to provide all children with protection and care to ensure their wellbeing.³² In doing this, states must take into account the rights and duties of parents of the children, legal guardians or other individuals legally responsible for their care.³³ The article goes on to require states parties to ensure that institutions, services and facilities responsible for the care or protection of children comply with established standards.³⁴

Article 3 of the CRC provides a basis on which all programmes and services, for the care and protection of children with disabilities, are established.³⁵ These provisions are all encompassing in that they aim to ensure the wellbeing of children in one way or the other, either through the state supporting parents and/or legal guardians in the

²⁸ See para 2.4.1 above.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ See para 2.4.1.4 above, for a discussion on why “a primary consideration” may lower or “water-down” the influence of the best interests principle.

³² Article 3(2) of the CRC.

³³ *Ibid.*

³⁴ Article 3(3) of the CRC.

³⁵ The Committee on the Rights of the Child “General Comment 9: The rights of children with disabilities” (2006) para 29 (General Comment 9).

care and protection of the children or through the state providing this care or protection itself.³⁶ The provisions are a comprehensive reference point for the interpretation by states of the responsibilities and obligations placed upon them by other more specific provisions.³⁷

The CRC contains the basic framework that upholds the right of every child to a family life.³⁸ Article 9(1) of the CRC places the obligation on states parties to ensure that children are not separated from their parents against their (the children's) will.³⁹ Such removal should only be effected when a competent authority believes that this is necessary and for the best interests of the child concerned.⁴⁰ This would occur in cases of abuse or neglect or if the parents are separated and the child's residence needs to be determined.⁴¹ Article 18(2) of the CRC provides that states parties should provide support to parents and/or legal guardians caring for children.⁴² It is submitted that this is especially necessary for parents and/or legal-guardians of children with disabilities who may not understand the special care needs of their children and how to provide them.

Article 19 of the CRC requires states parties to protect all children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation while under the care of their parents and/or legal guardians or other persons responsible for their care.⁴³ States are required to take appropriate legislative, administrative, social and educational actions in order to accomplish this.⁴⁴

Article 19 affirms that it is essential that all children be treated with human dignity and that the requisite respect is given to their physical and personal integrity.⁴⁵ This

³⁶ Hodgkin R & Newell P *Implementation Handbook for the Convention of the Rights of the Child* (2007) 40.

³⁷ *Ibid.*

³⁸ Lansdown G "Using the Human Rights Framework to promote the rights of children with disabilities: Discussion Paper – An analysis of the synergies between CRC, CRPD and CEDAW" (2009) 17.

³⁹ Article 9(1) of the CRC. This should be read with article 12 of the CRC which provides that children who can form their own views should have the right to express these views in all matters concerning them.

⁴⁰ Article 9(1) of the CRC.

⁴¹ *Ibid.*

⁴² Article 18(2) of the CRC.

⁴³ Article 19(1) of the CRC.

⁴⁴ *Ibid.*

⁴⁵ Hodgkin & Newell (n 36 above) 249.

includes children with disabilities who are often vulnerable to being victims and exposed to the different forms of abuse alluded to in the article.⁴⁶ This vulnerability arises due to a number of reasons that include, but are not limited to, the following:

- Some children have limited ability to perform certain functions such as moving, dressing, going to the toilet and bathing and require particularly personal care. This limitation makes them vulnerable to abuse;
- Some children live in isolation from people that can provide assistance such as parents, siblings, extended family and friends⁴⁷ and are therefore not likely to report abuse;
- Children that have communication or intellectual difficulties may be ignored, doubted or misunderstood if they tried to report abuse;
- Due to financial, emotional or other stress or pressure those caring for children with disabilities sometimes abuse the children;
- Children with disabilities are often not recognised as being human beings that, like everyone else, are learning to understand their own bodies and sexuality. This perception makes them especially vulnerable to sexual abuse.⁴⁸

In the light of the above the Committee on the Rights of the Child suggests that the following measures be taken to address violence and abuse against children with disabilities.⁴⁹ These measures include the training of parents and/ or legal guardians about the risks and signs of abuse;⁵⁰ the training of staff at institutions or facilities that provide care to children with disabilities⁵¹ – this training must comply with appropriate standards;⁵² the equipping of schools to combat bullying particularly against children with disabilities;⁵³ and taking legislative measures to ensure the

⁴⁶ General Comment 9 (n 35 above) para 42.

⁴⁷ It is important to note that children with disabilities can be victims of abuse at the hands of parents, siblings, family or other caregivers. For more information see Bornman J “Accessing justice via key role players: A view from South Africa” in Bryen DN & Bornman J (eds) *Stop Violence Against People with Disabilities* (2014) 50.

⁴⁸ General Comment 9 (n 35 above) para 42.

⁴⁹ General Comment 9 (n 35 above) para 44.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

punishment and removal of perpetrators from the home to ensure that the child is in a safe environment and is not deprived of his or her family.⁵⁴

Article 20 of the CRC provides that if a child is temporarily or permanently removed from their family environment they should be provided with special protection and assistance by the state.⁵⁵ States parties are placed with the responsibility of ensuring that such children are provided with alternative care.⁵⁶ This alternative care includes placement in foster care, adoption or if necessary suitable institutions.⁵⁷ Article 20 places a duty on states to not only provide alternative placements to children removed from family environments, but to also ensure that the negative effects of such removal are addressed.⁵⁸ These negative effects include the obstruction of physical, intellectual and emotional development due to, inter alia, the loss of family attachments and identity and the instability and disruption that comes with being in a new place.⁵⁹

To ensure that children in alternative care, including children with disabilities are receiving appropriate care, article 25 requires states parties to carry out periodic reviews of the treatment and care arrangements that the children are exposed to.⁶⁰ This ensures that each child's situation is continually monitored and that necessary interventions are made to encourage a child to thrive.⁶¹

The CRC, in dealing specifically with children with disabilities, provides in article 23(1) that states parties must recognise that all children with disabilities should enjoy full and decent lives.⁶² This enjoyment must ensure the promotion of dignity, self-reliance and the child's active participation in their community.⁶³ This recognition of a full and decent life is however not provided for or guaranteed as a right and therefore

⁵⁴ *Ibid.*

⁵⁵ Article 20(1) of the CRC.

⁵⁶ Article 20(2) of the CRC.

⁵⁷ Article 20(3) of the CRC.

⁵⁸ Hodgkin & Newell (n 36 above) 280.

⁵⁹ *Ibid.*

⁶⁰ Article 25 of the CRC.

⁶¹ Hodgkin & Newell (n 36 above) 282.

⁶² Article 23(1) of the CRC. It should be highlighted that chapter 2, para 2.4.1.1, of this dissertation discussed the provisions in article 23 of the CRC. This present discussion re-iterates the points raised for the purposes of the discussion on access to social services.

⁶³ *Ibid.*

places no obligation on states parties to take appropriate measures to fulfil this recognition.⁶⁴

Article 23(2) goes on to require states parties to recognise the right of children with disabilities to special care.⁶⁵ The article provides that states parties should provide assistance, to children with disabilities and to their caregivers, that is appropriate to the children's individual conditions and the circumstances of their parents or other caregivers.⁶⁶ This assistance is provided subject to available resources and on application by the parents or caregivers.⁶⁷ Article 23(3) states that this state assistance should be provided free of charge, whenever possible, with the financial resources of the parents or caregivers being taken into account.⁶⁸ This is also subject to conditions such as the consideration of the financial resources of the parents.⁶⁹

Article 23(2) and (3) acknowledge that there is a need for positive actions to ensure that children with disabilities are granted equal opportunities. However, as pointed out in chapter 2 of this dissertation, the provisions make access to assistance for children with disabilities subject to qualifications and limitations namely that the children must be eligible and apply for the services which are subject to available resources.⁷⁰ This results in the children having no absolute right to assistance. This has been identified as a major source of hardship to children with disabilities.⁷¹ The Committee on the Rights of the Child, in acknowledging the limitation that special care and assistance is subject to available resources, urges states parties to ensure that the provision of assistance is a matter of high priority particularly in the allocation of available resources.⁷²

⁶⁴ Kil Kelly U "Disability and children: The Convention on the Rights of the Child (CRC)" in Quinn G & Degener T *The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 191 192.

⁶⁵ Article 23(2) of the CRC.

⁶⁶ *Ibid*; para 2.4.1.1 above.

⁶⁷ *Ibid*.

⁶⁸ Article 23(3) of the CRC. See para 2.4.1.1 above.

⁶⁹ *Ibid*.

⁷⁰ See para 2.4.1.1 above; Boezaart T & Skelton A "From Pillar to post: Legal solutions for children with debilitating conduct disorder" in Grobbelaar-du Plessis I and van Reenen T *Aspects of disability law in Africa* (2011) 113.

⁷¹ Boezaart & Skelton (n 70 above) 113.

⁷² General Comment 9 (n 35 above) para 14.

Article 23(2) also does not specify how the right of children with disabilities to special care and assistance should be secured or enforced.⁷³ This is unlike other provisions, like article 19 as discussed above, which call for states parties to take appropriate measures to fulfil the responsibilities referred to.⁷⁴ This seems to create a lower standard for the fulfilment of such obligation for children with disabilities.⁷⁵

4.3.2 The African Charter on the Rights and Welfare of the Child, 1981

The ACRWC, in article 4, provides that the best interests of the child should be “the primary consideration” in all actions concerning the child.⁷⁶ By making the best interests of the child the primary consideration the ACRWC elevates and makes the most of the influence and authority that the best interests principle has over children’s wellbeing.⁷⁷ This is the opposite of the CRC’s provision which makes the best interests of the children “a primary consideration”, allowing for other principles and considerations to be born in mind and possibly override the best interests principle.⁷⁸ Article 4 of the ACRWC only deals with the best interests principle, unlike the CRC which in the same provision also deals with general state obligations.⁷⁹ This can be seen as the ACRWC’s way of accentuating the best interests of the child principle by committing a whole article to it.⁸⁰

In its provision that focuses specifically on children with disabilities, namely article 13, the ACRWC provides that children with disabilities have the right to benefit from special measures of protection to meet their physical and moral needs.⁸¹ This is to ensure that their dignity is respected and that self-reliance and active participation in their communities is promoted.⁸² As discussed in chapter 2 of this dissertation, when this provision is compared to article 23(1) of the CRC it is seen that while the ACRWC provides that children with disabilities “shall have the right to special measures of protection” the CRC provides that children with disabilities “should enjoy

⁷³ KilKelly (n 64 above) 192.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Article 4(1) of the ACRWC. See para 2.4.1.2 above.

⁷⁷ Gose M *The African Charter on the Rights and Welfare of the Child* (2002) 26; Schäfer L *Child Law in South Africa: Domestic and International Perspectives* (2011) 95-96; see para 2.4.1.2 above.

⁷⁸ Gose (n 77 above) 26; Schäfer (n 77 above) 95-96.

⁷⁹ Article 4 of the ACRWC; Gose (n 77 above) 26-27.

⁸⁰ *Ibid.*

⁸¹ Article 13(1) of the ACRWC.

⁸² *Ibid.*

a full and decent life”.⁸³ The CRC is very broad and unspecific while the ACRWC promotes a specific right and gives clear instruction on its application.⁸⁴

Both instruments provide special measures that states must undertake in order to provide for these special measures of protection. The ACRWC does this in article 13(2). It is however not as broadly structured as the CRC.⁸⁵ In addition, while the CRC recognises that children with disabilities have the right to special care the ACRWC does not provide for this in article 13(2).⁸⁶ It is submitted that this is problematic and limiting particularly in light of the fact that the provisions of social services involves ensuring the care and protection of children with disabilities as discussed in the above section on social services.⁸⁷

Article 16 of the ACRWC provides for specific legislative, administrative, social and educational measures to protect children, including children with disabilities, from inter alia, inhuman and degrading treatment.⁸⁸ This could include protection from sexual abuse, physical and mental abuse or injury, neglect and maltreatment.⁸⁹ Unlike the CRC article 19(1) of the ACRWC does not state that children should be protected from “all forms of physical or mental violence”. It also does not protect children from “negligent treatment” and “exploitation”.⁹⁰ It is submitted that this may create the impression that the ACRWC provides less protection to children than the CRC. However, it is noted that, despite the seemingly narrow drafting of the provision in the ACRWC, the protection from “inhuman and degrading treatment” allows for an interpretation that encompasses the types of abuse that have not been expressly included in article 16(1).⁹¹

Article 16(2) of the ACRWC provides that states are responsible for ensuring the protective measures that include the establishment of special monitoring units to

⁸³ Article 13(1) of the ACRWC; article 23(1) of the CRC; Gose (n 77 above) 89; Mezmur BD “The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?” (2008) 23 *Southern African Public Law (SAPL)* 1 9. See paras 2.4.1.2 and 2.4.1.3 above.

⁸⁴ Gose (n 77 above) 89.

⁸⁵ Gose (n 77 above) 90; Mezmur (n 83 above) 9. See paras 2.4.1.2 and 2.4.1.3 above.

⁸⁶ Article 13(2) of the ACRWC; article 23(2) of the CRC; Gose (n 77 above) 90.

⁸⁷ Para 4.1 above.

⁸⁸ Article 16(1) of the ACRWC.

⁸⁹ *Ibid.*

⁹⁰ Gose (n 77 above) 56-57; Viljoen F “The African Charter on the Rights and Welfare of the Child” in Boezaart T *Child Law in South Africa* (2009) 338-339.

⁹¹ Gose (n 77 above) 56-57; Viljoen (n 90 above) 338-339.

support the child and those caring for him or her.⁹² The support would also focus on the prevention, identification, reporting, referral, investigation, treatment and follow-up when child abuse and neglect has been reported.⁹³ The rest of the article is worded in a similar and almost identical manner as article 19(1) of the CRC with some differences that with proper interpretation would result in both the ACRWC and the CRC providing the same protection to children.⁹⁴

Article 18 of the ACRWC provides special protection to the family. It states that the family should enjoy protection and support from the state.⁹⁵ This provision is original to the ACRWC with no similar provision contained in the CRC.⁹⁶ Article 19(1) of the ACRWC also makes provision for states parties to ensure that all children who are entitled to parental care enjoy this right.⁹⁷ Children should not be separated from their parents against their (the children's) will unless a judicial authority decides that this is in accordance with law and in the best interests of the child.⁹⁸ This provision is similar to article 9 of the CRC.⁹⁹

The ACRWC, like the CRC, provides in article 25(1) that if a child is permanently or temporarily removed from their family environment, they should be provided with special protection and assistance.¹⁰⁰ It is, however, not specifically indicated whether the state has this obligation.¹⁰¹ This could point to the fact that the provision of special protection and assistance is not just a state function but a function of society.¹⁰²

Article 25(2) goes on to provide that states parties should ensure that such children should be provided with alternative care such as foster care or placement in suitable institutions that care for children.¹⁰³ The best interests of the child should be given due regard (or should be the primary consideration) in light of the desirability of the

⁹² Article 16(2) of the ACRWC.

⁹³ *Ibid.*

⁹⁴ Article 16 of the ACRWC; article 19 of the CRC; Gose (n 77 above) 57-85. See para 4.2.1 above.

⁹⁵ Article 18 of the ACRWC.

⁹⁶ Gose (n 77 above) 96. See Gose (n 77 above) 96-99, for a detailed discussion on the meaning of family in the African context and how article 18 seems to refer to the Western concept of family.

⁹⁷ Article 19(1) of the ACRWC.

⁹⁸ *Ibid.*

⁹⁹ See para 4.2.1 above.

¹⁰⁰ Article 25(1) of the ACRWC; Gose (n 77 above) 103.

¹⁰¹ Gose (n 77 above) 103.

¹⁰² *Ibid.*

¹⁰³ Article 25(2) of the ACRWC.

continuity and protection of their up-bringing and their ethnic, religious and linguistic background.¹⁰⁴

4.3.3 The United Nations Convention on the Rights of Persons with Disabilities, 2006

In its Preamble the CRPD, *inter alia*, affirms that children with disabilities should fully enjoy their human rights and fundamental freedoms on an equal basis with children without disabilities and that states have the obligation to ensure this.¹⁰⁵ It is submitted that these obligations include the realisation of children with disabilities' right to social services in order to ensure their care and protection.

Chapter 2 of this dissertation has already highlighted some of the principles of the CRPD and their importance for children with disabilities in general. These principles are, as a consequence, also extremely important for the fulfilment of the right of children with disabilities to social services. These principles, briefly, are as follows: children with disabilities should be viewed as human beings to be treated with respect and concern as a result of their inherent dignity;¹⁰⁶ children with disabilities should be treated with equality and should not be discriminated against on any ground; and the CRPD also encourages states parties to take steps to fast-track or achieve genuine equality of persons, including children, with disabilities.¹⁰⁷ The next principle that was discussed encourages the inclusion and participation of children with disabilities through the removal of societal barriers that hinder access to mainstream services and facilities.¹⁰⁸ Lastly, the evolving capacity of children with disabilities is recognised.¹⁰⁹ Although not a general principle of the CRPD it is also important to note that the CRPD acknowledges that the best interests of children with disabilities shall be a primary consideration.¹¹⁰

It is submitted that these principles should play an influential role in the manner in which social services are provided to children with disabilities to provide for their best

¹⁰⁴ Article 25(3) of the ACRWC.

¹⁰⁵ The Preamble of the CRPD.

¹⁰⁶ Para 2.4.1.4 above.

¹⁰⁷ Article 5 of the CRPD. See para 2.4 above.

¹⁰⁸ Article 9 and article 19 of the CRPD. See para 2.4 above.

¹⁰⁹ Article 3 of the CRPD. See para 2.4 above.

¹¹⁰ See discussions in para 2.4 above that criticise the use of "a primary consideration" as opposed to "the primary consideration" and the negative connotations attached to this phrase.

interests. Social services should be provided to children with disabilities in a manner that is respectful of their inherent dignity; takes into account their right to equality and non-discrimination; plays a role in promoting inclusion and participation in communities and society; and nurtures the evolving the capacities of children with disabilities.

Article 16 of the CRPD, thereafter, calls on states parties to protect persons, including children, with disabilities from all forms of exploitation inside and outside of the home by:

- Taking and making use of all appropriate legislative, administrative, social and educational measures;
- Ensuring that appropriate assistance and support (which is gender and age sensitive) is provided to persons and children with disabilities and their families. This should include providing information on ways to avoid, recognise and report exploitation, violence and abuse;
- Promoting the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons and children with disabilities who have been victims of exploitation, violence and abuse; and
- Enacting legislation and policies that ensure the identification, investigation and prosecution of exploitation, violence and abuse. States parties are called on to enact legislation and policies that are, inter alia, child focused.¹¹¹

Article 16 of the CRPD stems from or is an extension of article 19 of the CRC discussed above.¹¹² As a result article 16 of the CRPD, like article 19 of the CRC, in essence encourages that children with disabilities be viewed and treated as human beings with dignity and respect and that their physical and personal integrity be protected.¹¹³ Article 16 of the CRPD comes from the recognition that children with disabilities are often victims of abuse and exploitation in and out of the home as well as care institutions.¹¹⁴ It is submitted that the article arises out of the recognition that

¹¹¹ Article 16 of the CRPD.

¹¹² Kayess R & French P "Out of the Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities" (2008) 8 *Human Rights Law Review* 1 29 and fn 124 therein.

¹¹³ Read article 16 with article 17 of the CRPD which provides that "[e]very person with disabilities has a right to respect for his or her own physical and mental integrity on an equal basis with others".

¹¹⁴ Byrne B "Minding the gap? Children with Disabilities and the United Nations Convention on the Rights of the Persons with Disabilities" in Freeman M *Law and Childhood Studies* (2011) 431.

action is needed in response to such unacceptable activities of abuse and exploitation against children with disabilities.¹¹⁵ Similar protection is provided in article 16 of the ACRWC.¹¹⁶

Article 23 of the CRPD deals with respect for home and family. Article 23(3) provides that states parties must provide early and comprehensive information, services and support to children with disabilities in order to protect them from and prevent concealment, abandonment, neglect and segregation.¹¹⁷ Article 23(4) then requires states parties to ensure that children with disabilities are not separated from their families against their will unless competent authorities believe that such removal is in the best interests of the child.¹¹⁸ Such removal should never be based on the fact that either the child or the parent is a person with disability.¹¹⁹ Lastly, article 23(5) makes the placement of a child in an institution a last resort.¹²⁰ The article provides that if a child is removed from their family, attempts should be made to place them in the care of the wider family or with the community in a family setting.¹²¹ This article acknowledges the negative consequences that long term institutionalisation has on children with disabilities and attempts to shift focus away from institutionalisation towards family and community based care.¹²² Article 23 of the CRPD provides better protection or considerably strengthened protection of the right to family than its counterparts in the CRC and the ACRWC. These instruments do not place as strong an emphasis on provision for wider family or community care as the CRPD.¹²³

Article 28 provides states parties with the responsibility to ensure that persons and children with disabilities, and their families, benefit from an adequate standard of living and social protection.¹²⁴ States parties are called to ensure the provision of, inter alia, adequate food, clothing and housing, and to the continuous improvement of living conditions.¹²⁵ States parties must take all appropriate steps to ensure that

¹¹⁵ Clifford J “The UN Disability Convention and its impact on European Equality Law” (2011) 6 *The Equal Rights Review* 1116-17.

¹¹⁶ Para 4.3.2 above.

¹¹⁷ Article 23(3) of the CRPD.

¹¹⁸ Article 23(4) of the CRPD.

¹¹⁹ *Ibid.*

¹²⁰ Article 23(5) of the CRPD.

¹²¹ Article 23(5) of the CRPD; Byrne (n 114 above) 432; Lansdown (n 38 above) 17.

¹²² Byrne (n 114 above) 431.

¹²³ Lansdown (n 38 above) 17.

¹²⁴ Article 28(1) of the CRPD.

¹²⁵ *Ibid.*

the promotion and preservation of this right without disability based discrimination.¹²⁶ Article 28 calls on states parties to ensure that persons with disabilities have access to:

- Clean water as well as appropriate and affordable services, devices and other disability related assistance;
- Social protection programmes and poverty reduction programmes, particularly to women and girls with disabilities;
- Disability related expenses in situations of poverty; and
- Retirement benefits and programmes.¹²⁷

Once the provisions in the CRC, the ACRWC and the CRPD are perused and discussed in the light of the meaning given to the right to social services some common threads are noted. Despite a number of differences in the formulation of provisions as well as acknowledged similarities, it is seen that all 3 instruments aim to ensure that all children, including children with disabilities, benefit from parental and/or family care. Preference is given to equipping parents and/or families to care for the children before the option of removal is considered. If children are to be removed from their parents and/or families this removal is only conducted in very specific circumstances of, inter alia, abuse, neglect and exploitation. Once removed and placed in alternative care this care option must meet the care needs of the children concerned.

4.4 THE SOUTH AFRICAN CONSTITUTION AND NATIONAL LEGISLATION

The discussions to follow below will focus on provisions in the Constitution and the Children's Act. The aim will be to determine how they comply with the above standards set by the CRC, ACRWC and the CRPD.

4.4.1 The Constitution of the Republic of South Africa, 1996

Section 28(1)(c) of the Constitution contains the basic socio-economic rights of children in South Africa including the right to social services.¹²⁸ The section provides the following:

¹²⁶ *Ibid.*

¹²⁷ Article 28(2) of the CRPD.

- (1) Every child has the right ...
...
(c) to a basic nutrition, shelter, basic health care services and *social services* [my emphasis].¹²⁹

The discussion in the dissertation will focus on the right to social services as detailed discussions on nutrition, shelter and basic health care services are beyond the scope of this dissertation. They will only form part of the discussions in as far as they relate to the protection and promotion of the right to social services.

The section begins with highlighting the fact that “every child” has the right to access the services therein. It is submitted that this makes it clear that children with disabilities are to benefit from section 28(1)(c) just as much as other children. Secondly, the term “basic” in the section is an indication of the fact that children should have access to essential levels of social services in a manner that promotes their survival and proper development.¹³⁰

Section 28(1)(c) is textually different from other socio-economic rights contained in the Constitution.¹³¹ The other socio-economic rights in the Constitution, namely section 26 (right to housing) and section 27 (rights to health care, food, water and social security) all contain qualifying phrases that make their implementation subject to the state “taking reasonable measures” and making use of “available resources”.¹³² Section 28(1)(c) does not contain these qualifying phrases unlike the CRC which, as mentioned earlier, makes access to assistance for children subject to qualifications and limitations.¹³³ Therefore section 28(1)(c), read with section 28(2) of the Constitution which provides that a child’s best interests are of paramount importance,¹³⁴ requires the state to provide immediate and effective provision of the rights contained therein.¹³⁵ This is especially so for children who have been removed

¹²⁸ Liebenberg (n 1 above) 232.

¹²⁹ S 28(1)(c) of the Constitution.

¹³⁰ Liebenberg (n 1 above) 233.

¹³¹ Liebenberg (n 1 above) 234; Skelton (n 5 above) 610; Proudlock P “Children’s Socio-economic Rights” in Boezaart T *Child Law in South Africa* (2009) 293-295.

¹³² S 26 and s 27 of the Constitution; Liebenberg (n 1 above) 234; Proudlock (n 131 above) 293-295.

¹³³ Para 4.3.1 above.

¹³⁴ See para 2.4.2 above, for a discussion on section 28(2) of the Constitution.

¹³⁵ It should be noted however that section 4 of the Children’s Act echoes the CRC. The section provides the following: “Recognising that competing social and economic needs exist, organs of state in the national, provincial and where applicable, local spheres of government must, in the implementation of [the Children’s Act], take reasonable measures to the maximum extent of their

from family care and placed in alternative care as they have become the sole responsibility of the state or “wards of the state”.¹³⁶ This will be seen in discussions further in this chapter on services for children with emotional and behavioural difficulties in alternative care.

A further right applicable in the implementation of the right to social services is the right to family care as set out in section 28(1)(b) which provides that “[e]very child has the right ... to family care or parental care, or to appropriate alternative care when removed from the family environment”.¹³⁷ The state is placed with the responsibility of supporting the family institution.¹³⁸ Such support would include, inter alia, the provision of educational and support programmes to parents and/or caregivers of children and children themselves; assistance and support to single parents and/or caregivers; the provision of early childhood development centres in communities; and early childhood development programmes.¹³⁹ Removal of the child and placement into alternative care is provided as a last resort.¹⁴⁰ This protection of the family unit (in whatever form) is in line with or similar to the protections set out in the CRC in article 9(1) and 18(2), the ACRWC in article 18 and the CRPD in article 23.¹⁴¹

Section 28(1)(d) of the Constitution further provides that “[e]very child has the right...to be protected from maltreatment, neglect, abuse or degradation”.¹⁴² Again this protection is afforded to children with disabilities in a similar vein as the CRC, the ACRWC and the CRPD.¹⁴³ Examples of social services in this regard would include the provision of programmes that support children and their parents and/or

available resources to achieve the realisation of the objects of this Act.” Skelton and Proudlock note that this “does not imply that developing countries can avoid their responsibilities. It should rather be understood as a call for prioritisation of children within the state budget so as to ensure appropriate levels of service delivery ... It is also important to stress that the Act must be interpreted within the context of the Bill of Rights in the Constitution ... the absence of an internal limitations clause in s 28(1)(c) was not an error, but a purposeful attempt to reflect the international instruments in the Constitution.” See Skelton A and Proudlock P “Interpretation, objects, application and implementation of the Children’s Act” in Davel CJ and Skelton AM (eds) *Commentary on the Children’s Act (2007)* 1-33.

¹³⁶ Proudlock (n 131 above) 296-297; Liebenberg (n 1 above) 238.

¹³⁷ S 28(1)(b) of the Constitution.

¹³⁸ Skelton (n 5 above) 604.

¹³⁹ Dutschke & Monson (n 18 above) 24.

¹⁴⁰ S 28(1)(b) of the Constitution.

¹⁴¹ Paras 4.3.1, 4.3.2 and 4.3.3 above.

¹⁴² Section 28(1)(d) of the Constitution.

¹⁴³ Paras 4.3.2, 4.3.2 and 4.3.3 above.

caregivers.¹⁴⁴ They would also include the establishment of mechanisms that ensure the identification, reporting, referral, investigation and following up of abuse and neglect.¹⁴⁵

4.4.2 The Children's Act 38 of 2005

The Children's Act 38 of 2005 is the primary legal framework designed to give effect to the constitutional rights of all children discussed above namely,¹⁴⁶ the right to social services; the right to family care or parental care or appropriate alternative care; and the right to be protected from maltreatment, neglect, abuse or degradation.¹⁴⁷ The Children's Act also aims to give effect to the fact that the "best interest of the child are of paramount importance in every matter concerning the child".¹⁴⁸ One notes the level of influence given to the best interests of the child as being similar to that of the ACWRC and not the CRC's (or CRPD's) watered down provision on the best interests principle.¹⁴⁹ The further objective of the Act is to ensure compliance with the state's obligations as set out in international instruments.¹⁵⁰

Section 6¹⁵¹ sets out the general principles of the Act and provides that actions, decisions and proceedings that concern children must accomplish the following:

- (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in [the] Act, subject to any lawful limitation;
- (b) respect the child's inherent dignity;
- (c) treat the child fairly and equitably;
- (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
- (e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and

¹⁴⁴ Dutschke & Monson (n 18 above) 24.

¹⁴⁵ *Ibid.*

¹⁴⁶ See para 1.1.4 above.

¹⁴⁷ S 2(b) of the Children's Act 38 of 2005.

¹⁴⁸ *Ibid.*

¹⁴⁹ Par 4.3.1, 4.3.2 and 4.3.3 above.

¹⁵⁰ *Ibid.*

¹⁵¹ Para 1.1.4 above.

- (f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has.¹⁵²

The general principles encourage a child-centred approach to the implementation of the Act.¹⁵³ It is significant to note that the general principles specifically state that children with disabilities should be protected from unfair discrimination.¹⁵⁴ The above general principles bring one's attention to the delicate role that parents, families and the state must play in ensuring the well-being of all children, including children with disabilities. The section highlights the fact that "on the one hand, children should be encouraged to maximise their potential. On the other hand, it is recognised that children are vulnerable and that they need protection".¹⁵⁵

Section 9 of the Children's Act reaffirms the constitutional principle of the best interests of the child and provides that "[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied".¹⁵⁶ Section 7 goes into further details of how this should be done and sets out a number of factors that must be considered when applying the principle.¹⁵⁷ These factors include, inter alia, the effect on the child of any changes in his or her circumstances; if the child is a child with a disability; the need for a child to be raised in a stable environment; protection of the child from physical or psychological harm; and the child's age, gender and background.¹⁵⁸

Section 11(1) of the Children's Act¹⁵⁹ is particularly important for children with disabilities. The section is dedicated specifically to children with disabilities and provides that the following must be considered in any matter concerning a child with a disability:

- (a) providing the child with parental care, family care or special care as and when appropriate;

¹⁵² S 6(2) of the Children's Act.

¹⁵³ Boezaart T "General Principles" in Davel CJ & Skelton AM (eds) *Commentary on the Children's Act* (2007) 2-3.

¹⁵⁴ *Ibid.*

¹⁵⁵ Boezaart & Skelton (n 70 above) 123.

¹⁵⁶ S 9 of the Children's Act.

¹⁵⁷ S 7 of the Children's Act.

¹⁵⁸ See s 7 of the Children's Act for a complete list of the factors.

¹⁵⁹ Para 1.1.4 above.

- (b) making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have;
- (c) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and
- (d) providing the child and the child's care-giver with the necessary support services.¹⁶⁰

All of the above provisions of the Children's Act, particularly section 11, are applicable to children with disabilities and necessary to ensure that their right to social services is promoted and protected. The above provisions ensure that children with disabilities are not "left behind" but are instead placed in a position where their well-being is considered and promoted in an equal manner as children without disabilities.

In addition to the above provisions, the Children's Act goes into greater detail on the provision of different social services to all children, this includes children with disabilities. Some of these, particularly those applicable to this dissertation, will be discussed below.

Chapter 5 of the Children's Act makes provision for the establishment and maintenance of partial care facilities.¹⁶¹ A partial care facility provides care to more than six children during specific hours on behalf of their parents and/or caregivers.¹⁶² This service is particularly useful for parents and/or caregivers who need additional support in the care of children with disabilities.¹⁶³

The Act places an obligation on the state to ensure that all children are provided with the basic necessities of life at an early age.¹⁶⁴ Chapter 6 of the Act provides for early childhood development, namely the "[p]rocess of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school-going age".¹⁶⁵ The Children's Act envisages that all children will have access to early childhood development services and programmes as a way to

¹⁶⁰ S 11(1) of the Children's Act.

¹⁶¹ S 76 of the Children's Act.

¹⁶² *Ibid.*

¹⁶³ Boezaart T "The Children's Act: A valuable tool in realising the rights of children with disabilities" (2011)74 *Tydskrif vir Hedensdaagse Romeins-Hollandse Reg (THRHR)* 264 273.

¹⁶⁴ Boezaart (n 163 above) 273.

¹⁶⁵ S 91(1) of the Children's Act.

holistically ensure appropriate development and growth.¹⁶⁶ This is especially true for children with disabilities who are often in need of special early childhood development services.¹⁶⁷ The CRPD, which came into force after the Act, also contains a provision on early childhood development. Article 23(3) provides that states must, inter alia, provide early and comprehensive services and support to children with disabilities.¹⁶⁸ These two legal provisions read together could provide stronger basis to be used to keep duty bearers accountable in their provision of this service.

Chapter 8 of the Children's Act provides for prevention and early intervention services to children and their families.¹⁶⁹ The prevention services aim to provide families caring for children with the capacity to address problems that could lead to state intervention if not addressed adequately.¹⁷⁰ The early intervention services and programmes are provided to families in which children have been identified as being vulnerable to or at risk of harm and placement into alternative care.¹⁷¹

The drafters of the Children's Act were aware that not all children are in family environments that are conducive to their well-being and development. They therefore included chapter 9 of the Children's Act which sets out the procedures to be followed when a child is found to be in need of care and protection.¹⁷² A child is considered to be in need of care and protection when, inter alia, he or she is abandoned or orphaned and is without visible means of support; and displays behaviour that the parents or caregivers cannot control.¹⁷³ A child is also considered to be in need of care and protection if he or she lives in or is exposed to circumstances that could cause serious harm to his or her physical, mental or social state; has been neglected physically and mentally; and is maltreated, abused or deliberately neglected by a parent or caregiver.¹⁷⁴ Children with disabilities are often found to be in situations

¹⁶⁶ Boezaart (n 163 above) 273.

¹⁶⁷ *Ibid.*

¹⁶⁸ Para 4.3.3 above.

¹⁶⁹ Chapter 8 of the Children's Act.

¹⁷⁰ S 143(1) of the Children's Act.

¹⁷¹ S 143(2) of the Children's Act. See s 144(1) for the aims of prevention and early intervention services and programmes.

¹⁷² Chapter 9 of the Children's Act.

¹⁷³ S 150(1) of the Children's Act.

¹⁷⁴ *Ibid.*

where their parents or caregivers cannot or will not care for them appropriately.¹⁷⁵ Children with disabilities are also often in situations where prevention and early intervention services did not produce desirable results.¹⁷⁶ This results in the children being found to be in need of care and protection and often being placed in alternative care.¹⁷⁷

The alternative care options are provided for in chapters 11, 12 and 13 of the Children's Act. A child is considered to be in alternative care if they have been placed in foster care or in a child and youth care centre (CYCC) through an order of a Children's Court.¹⁷⁸ If a child is removed from the care of his or her parents and/or caregiver the next best option is for the child to be placed in foster care.¹⁷⁹ The purpose of foster care is to ensure that the child is in a safe and healthy environment with the requisite positive support; to foster family reunification or nurturing family environments for the ultimate purpose of permanent placement; promoting respect for cultural, ethnic and community diversity through placing children with these features in mind.¹⁸⁰ The CRPD in a similar vein promotes the placement of children in a family setting to encourage family and community based care for children removed from the care of their parents or caregivers.¹⁸¹

The next alternative care option is the placement of a child in a CYCC. A CYCC is a facility that provides residential care services to more than six children in accordance with a residential care programme.¹⁸² The Children's Act provides that CYCCs must offer therapeutic programmes to the children being cared for.¹⁸³ It is significant to note for purposes of this dissertation that this includes a therapeutic programme for the care of children with behavioural, psychological and emotional difficulties.¹⁸⁴

¹⁷⁵ Boezaart (n 153 above) 276.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ S 167(1) of the Children's Act.

¹⁷⁹ Gallinetti J & Loffell J "Foster Care" in Davel CJ & Skelton AM (eds) *Commentary on the Children's Act* (2007) 12-9.

¹⁸⁰ S 181 of the Children's Act.

¹⁸¹ Para 4.3.3 above.

¹⁸² S 191(1) of the Children's Act.

¹⁸³ S 191(2)(i) of the Children's Act.

¹⁸⁴ *Ibid.*

Therapeutic programmes can also be offered for the care and development of children with disabilities.¹⁸⁵

The CRC, ACRWC and the CRPD all contain provisions protecting the right to social services and related rights that apply to children with disabilities.¹⁸⁶ The discussion on the Constitution and the Children's Act highlights the fact that South Africa has taken and continues to take these international and regional law provisions and places them in a South African context to meet the needs of children in South Africa. It has been highlighted above that both the Constitution and the Children's Act provide for the protection of the right to social services, the right to family life and the right to be protected from maltreatment, abuse, neglect and degradation. The Constitution provides that basis for the protection of these rights in section 28(1)(b)(c) and (d). The Children's Act expands on these constitutional protections and gives practical voice to the rights.

The next task is to determine the effectiveness of the implementation of these commendable legal provisions in the lives of children with disabilities, particularly children with emotional and behavioural difficulties in alternative care. This group of children has been chosen to be the focus of discussions going forward for three reasons. The first reason is that although it would have been helpful to delve into a broad discussion on the provision of social services to all children with disabilities the limitations on this dissertation do not allow for such a wide and extensive discussion. To try and fit such a discussion into this dissertation would result in a watering down of issues as opposed to engaging in a more comprehensive discussion.¹⁸⁷ Secondly, children with emotional and behavioural difficulties have been identified as a group of children whose rights, particularly their right to social services and related rights, are often neglected and they are extremely vulnerable as a result of this.¹⁸⁸ Finally, it has been highlighted above that children in alternative care have an immediate and

¹⁸⁵ S 191(3)(a) of the Children's Act.

¹⁸⁶ Para 4.2 above.

¹⁸⁷ Para 1.6 above.

¹⁸⁸ Breen N "Between the cracks: How the State fails to provide for and protect children with a debilitating form of conduct disorder" (2011) 13 *Article 40* 5.

urgent claim to access to social services due to the fact that they are solely under state care.¹⁸⁹

4.5 THE RIGHT TO SOCIAL SERVICES FOR CHILDREN WITH EMOTIONAL AND BEHAVIOURAL DIFFICULTIES IN ALTERNATIVE CARE

Children with emotional and behavioural difficulties are often not understood and appropriately cared for in the South African context.¹⁹⁰ This occurs despite the existence of legal frameworks that require appropriate care in the home environment or care facilities.¹⁹¹ The gap between law and practice results in the children often ending up in the criminal justice system due to the fact that their behaviour is not understood and managed properly.¹⁹²

Emotional and behavioural difficulties, also often referred to as conduct disorders,¹⁹³ can manifest themselves in behaviour and emotional responses that are very different from appropriate age, cultural and ethical norms.¹⁹⁴ Children with emotional and behavioural difficulties usually experience adverse difficulties in their academic, social, vocational and personal spheres of life.¹⁹⁵ Emotional and behavioural difficulties are characterised in many ways depending on the individual child. Children may:

- Display violent behaviour or retaliation towards others;
 - Be physically abusive towards others;
 - Express no regard or care for other people or other people's property;
 - Be indifferent towards other people's feelings or may not express any apathy;
- and

¹⁸⁹ Para 4.3.1 above.

¹⁹⁰ Boezaart & Skelton (n 70 above) 107.

¹⁹¹ Breen (n 188 above) 5; para 4.3.2 above.

¹⁹² Breen (n 188 above) 5.

¹⁹³ Despite the fact that technically this is identified as a specific emotional and behavioural difficulty itself. See American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (2013) 469-471 and Sadock BJ and Sadock VA *Synopsis of Psychiatry: Behavioural Sciences/Clinical Psychiatry* (2003) 1234-1235.

¹⁹⁴ Anderson SR "Psycho-Educational Process as Strategies for Students Presenting with Emotional and Behavioural Disorders" (2012) 2 *American International Journal of Contemporary Research* 25 26.

¹⁹⁵ *Ibid.*

- Display unusual behaviour and attitudes even in “normal circumstances”.¹⁹⁶

The reason or cause for a child’s emotional and behavioural difficulties is often not clearly determinable.¹⁹⁷ A combination of factors often play a role in the manifestation of emotional and behavioural difficulties in children, these include biological, environmental and psychological factors.¹⁹⁸ The American Diagnostic and Statistical Manual of Mental Disorders contains some examples of emotional and behavioural difficulties that could be experienced by children.¹⁹⁹ These, inter alia, include adjustment disorders that children exhibit when they are not able to appropriately respond to stressful events or changes they experience.²⁰⁰ They also include anxiety disorders that are expressed in exaggerated anxiety and cause serious physical symptoms, disorders in conduct or inappropriate emotional responses.²⁰¹ Oppositional defiant disorder occurs when children act in negative, defiant, disobedient and hostile manners.²⁰² Conduct disorder in children is expressed in:

a repetitive and persistent pattern of behaviour in which the basic rights of others or major age-appropriate social norms or rules are violated ... Conduct disorder is often associated with early onset of sexual behaviour, drinking, smoking and reckless and risk-taking acts.²⁰³

Parents and families are often not able to cope with these children due to lack of support and/or requisite skills and knowledge.²⁰⁴ The children, therefore, end up being removed from their homes and are confronted with the criminal justice system due to poor impulse control.²⁰⁵ Once removed the children are exposed to less than desirable conditions in alternative care placements or are sent from one inappropriate placement to another without receiving the required social services

¹⁹⁶ Anderson (n 194 above) 26-27.

¹⁹⁷ PACER Centre “What is An Emotional or Behavioral Disorder?” (2006) *Action Information Sheet* 1.

¹⁹⁸ *Ibid.*

¹⁹⁹ American Psychiatric Association (n 193 above) 189-264 and 462-476; PACER Centre (n 197 above) 2; Breen (n 175 above) 5.

²⁰⁰ American Psychiatric Association (n 193 above) 189-264 and 462-476; PACER Centre (n 197 above) 2-3.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ PACER Centre (n 197 above) 2-3; Breen (n 188 above) 6.

²⁰⁴ Boezaart & Skelton (n 70 above) 107-108.

²⁰⁵ Boezaart & Skelton (n 70 above) 107-108; Breen (n 188 above) 6.

including therapeutic interventions required by the Children's Act.²⁰⁶ Discussions to follow will highlight the difficulties and failures experienced by children with emotional and behavioural difficulties in South Africa.

4.5.1 Jurisprudence on the right to social services for children with emotional and behavioural difficulties in alternative care

In 2008, the Centre for Child Law (the Centre) was concerned about conditions at JW Luckhoff School of Industry where children with emotional and behavioural difficulties were placed through a court order if found to be in need of care and protection.²⁰⁷ In *Centre for Child Law and Others v MEC for Education, Gauteng, and Others*,²⁰⁸ the Centre took the matter to the then Transvaal Provincial Division (now the North Gauteng High Court) in order to obtain relief for the children.

The action arose as a result of the fact that the children placed at the JW Luckhoff School of Industry were living in deplorable conditions and were not provided with appropriate access to social services.²⁰⁹ The hostels that 111 children were living in were in varying degrees of physical deterioration with most having no windows.²¹⁰ The floors were in a very poor condition, the showers were not structured in cubicles for privacy and toilets had no doors.²¹¹ The children were exposed to the elements as the windows and ceiling boards were broken. This was especially concerning at the time the case was brought because it was winter and children were exposed to the harsh cold.²¹² The sleeping quarters had no heating and in some instances no electricity.²¹³ The children slept on dirty old foam mattresses on old bed stands.²¹⁴ The blankets they used were thin and dirty.²¹⁵

²⁰⁶ Boezaart & Skelton (n 70 above) 107. Also see para 4.3.2 above.

²⁰⁷ This was during the time of the Child Care Act 74 of 1984 and before the enactment of the Children's Act. The schools of industries are now referred to as Child and Youth Care Centres in terms of s 196(1)(d) of the Children's Act.

²⁰⁸ 2008 (1) SA 223 (T).

²⁰⁹ *Centre for Child Law and Others v MEC of Education, Gauteng, and Others* 2008 (1) SA 223 (T) 226F-G (*Centre for Child Law*).

²¹⁰ *Ibid.*

²¹¹ *Centre for Child Law* 226G-H.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

On 28 June 2006, the Centre sought an urgent court order compelling the MEC of Education and other relevant authorities to immediately provide children at JW Luckhoff School of Industry with sleeping bags, to put in place proper access control and organise for psychological support structures.²¹⁶ The Centre also wanted the MEC for Education to urgently make arrangements for the school to undergo a developmental quality assurance process in order to ensure the production and implementation of an organisational development plan.²¹⁷ The Centre argued that the conditions at the schools infringed on the children's rights as set out in section 28 of the Constitution as well as their human dignity (section 10 of the Constitution) and the right not to be subjected to cruel, inhuman or degrading treatment (section 12 of the Constitution).²¹⁸

The MEC for Education did not deny the existence of such conditions at the school.²¹⁹ The argument was however that it would be expensive to provide sleeping bags.²²⁰ The MEC argued that provision of the sleeping bags would result in discrimination against other children in similar institutions who would not receive sleeping bags.²²¹

The court rejected this argument and affirmed the fact that section 28 rights do not contain internal limitations making their implementation subject to available resources and legislative measures.²²² This makes the rights therein unqualified and immediate.²²³

The court further held that the equality argument advanced by the respondent was unjustified.²²⁴ The court found that it could never be a defence that the granting of a remedy should be denied due to the fact that others in a similar situation would seek

²¹⁶ *Centre for Child Law* 225D-F.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Centre for Child Law* 227D.

²²⁰ *Centre for Child Law* 227D-F.

²²¹ *Centre for Child Law* 227F-H.

²²² *Centre for Child Law* 227H-J.

²²³ *Ibid.*

²²⁴ *Centre for Child Law* 228B-E.

the same remedy.²²⁵ This is surpassed by the need to protect the dignity of the children concerned.²²⁶

The court acknowledged the fact that the Constitution places a duty on society and the state to treat children with the highest standard of care.²²⁷ The state in particular has the duty to care for and protect children removed from their family environment.²²⁸ The state has the responsibility to provide appropriate facilities and meet children's basic needs.²²⁹

The court was particularly exasperated by the lack of psychological and therapeutic care and services.²³⁰ It noted that one of the main reasons for placing the children in school of industry was care and rehabilitation.²³¹ This was done to ensure skilled intervention in the children's lives, a necessary aspect of state care particularly in light of absent parental support.²³² The school had no psychologist or social worker.²³³ The court expressed the following sentiments:

[W]hat message do we send to the children when we tell them that they are to be removed from their parents because they deserve better care, and then neglect wholly to provide that care? We betray them, and we teach them that neither the law nor State institutions can be trusted to protect them. In the process we are in danger of relegating them to a class of outcasts, and in the final analysis we hypocritically renege on the constitutional promise of protection.²³⁴

The court found that the practices at the school of industry violated the children's rights as contained in section 28(1)(b) and (c) of the Constitution, section 28(2) of the Constitution as well as sections 10 and 12(1)(c) and (e) of the Constitution.²³⁵ The MEC for Education was immediately directed to provide sleeping bags to the children and ensure that the premises were secure.²³⁶ The MEC for Education was also

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *Centre for Child Law* 228E-G.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Centre for Child Law* 229B-C.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Centre for Child Law* 228C-E.

²³⁵ *Centre for Child Law* 230D-231G.

²³⁶ *Ibid.*

ordered to ensure that the school was subjected to a quality assurance process by a multidisciplinary team.²³⁷

This judgment highlights the desperate case of children with emotional and behavioural difficulties. It confirmed the fact that their social services, and other related socio-economic rights such as the right to basic education, are not being met by duty bearers. The right to basic education is highlighted here due to the fact that the environment that the children found themselves in could not have been conducive to nurturing the ability to learn.²³⁸ This inability of the state to comply with its obligations is in conflict with international and regional law as well as the Constitution and the rights therein. The judgment also highlights the immediate obligation that the state has to provide social services to these children and obviously other vulnerable children with disabilities in alternative care.

Discussions will continue with the thread of highlighting the ways in which children with emotional and behavioural difficulties in alternative care are being ill-treated and will also provide some suggestions on the way in which better care and services can be established.

4.5.2 Case studies on the failure to meet the social services needs of children with emotional and behavioural difficulties in alternative care

In 2010, a curator's report was submitted to the North Gauteng High Court detailing how two boys with debilitating conduct disorder²³⁹ had been failed by the state.²⁴⁰ The boys had been removed from their families and placed in CYCCs.²⁴¹ They were then placed in a psychiatric hospital and then back in the CYCCs and eventually came into contact with the criminal justice system.²⁴²

The first child is referred to as "A". He was 14 years old at the time that the matter was brought before the North Gauteng High Court. He had a small physique that made him look much younger. A had been placed in more than one CYCC and

²³⁷ *Ibid.*

²³⁸ Para 4.1 above.

²³⁹ Boezaart & Skelton (n 70 above) 107: Due to the fact that the boys' lives had been disrupted as result of the conduct disorder.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Ibid.*

psychiatric facility due to his father's inability to care for him. He had been diagnosed with a number of disorders including conduct disorder, ADHD and dysthymic disorder. He was referred to a psychiatric hospital because he was acting out and the CYCCs could not manage his behaviour. After being stabilised with medication he would be sent back to the CYCCs. In October 2009 a charge of malicious damage to property was laid against him by a CYCC. He was then transferred to a secure care facility that housed child offenders pending the criminal justice process. The secure care centre kept him sedated for most of his stay there. The secure care centre found him to be vulnerable due to his size but aggressive at the same time. He was then referred to a psychiatric hospital and in 2010 his behaviour was described as being erratic and uncontrollable. A curator ad litem was appointed on his behalf.²⁴³

The second child is referred to as "G". He was 16 years old at the time the matter was before the North Gauteng High Court. G had been neglected by his parents from a very young age. He was adopted at the age of 6 but his mother took him back when he was 10. He was removed from his mother's care due to her inability to care for him. His adoptive parents also refused to care for him. He was placed in a care institution and then in a psychiatric hospital due to his unmanageable behaviour and was moved from placement to placement. When G was 15 years old he was arrested for malicious damage to property and placed in a secure facility while awaiting the finalisation of his case. This placement became unviable and he was moved to prison and kept in a cell for 23 hours a day for several months. The social worker in charge of his case noted that "there is no infrastructure to deal with severe conduct disorder and aggressive behaviour in children". G was acquitted as a result of criminal incapacity and placed in a care facility. This placement quickly deteriorated and G ended up at a psychiatric hospital. The curator appointed for A was also appointed for G.²⁴⁴

During the course of his investigations into the circumstances of A and G, as well as the state's provision of alternative care services to such children, the curator came across many other children in similar circumstances in the Gauteng province

²⁴³ The narrative of A's case is taken from Boezaart & Skelton (n 70 above) 108-109.

²⁴⁴ The narrative of G's case is taken from Boezaart & Skelton (n 70 above) 109-110 and the Report of the curator ad litem in the case of *Centre for Child Law v MEC Health and Social Development, Gauteng North* Gauteng High Court case no 37850/2010 1-28 (Report of the curator ad litem).

alone.²⁴⁵ These children all experienced similar challenges and were hindered by the lack of appropriate placement options available.

The curator came to the conclusion that a number of A and G's constitutional rights had been infringed by a system ill-equipped to provide appropriate care and social services:

I set out the breaches of [G]'s and [A]'s rights not as any sort of attack on the staff of various institutions that I have dealt with but rather as an explanation of a system that has serious flaws. I have encountered staff in the system, frustrated by the serious defects in the system who do not know where to turn in dealing with children with conduct disorder. I have encountered staff that work very long hours and clearly have a passion for the work that they do. It is the system that must be addressed urgently and comprehensively.²⁴⁶

The infringed constitutional rights identified include, inter alia, the right to equality (section 9); the right to dignity (section 10); the right to appropriate alternative care (section 28(1)(b)); the right to social services (section 28(1)(c)); and the best interests of the child standards (section 28(2)).²⁴⁷

The curator also noted that A and G's right to basic education had been infringed as a result of the number of placements and institutions that they were in.²⁴⁸ One notes from the above narratives that they were never in one place long enough to be enrolled in a school or educational programme and actually benefit from it. This lack of access to basic education hindered the development of their personality, talents, and mental and physical abilities.²⁴⁹

The above narrative paints a picture of a system failing in its obligation to provide adequate social services to children with emotional and behavioural difficulties and promote related rights. It shows a system ill-equipped to provide appropriate alternative care for the children, a system with little to no alternative care options. This is despite the fact that there is a constitutional mandate to provide such care

²⁴⁵ Report of the curator ad litem (n 244 above) 28; Breen (n 188 above) 6.

²⁴⁶ Report of the curator ad litem (n 244 above) 79.

²⁴⁷ Report of the curator ad litem (n 244 above) 91; See para 2.4 above for a discussion on equality, dignity and the best interests and para 4.4 above for a discussion on appropriate alternative care and social services.

²⁴⁸ Report of the curator ad litem (n 244 above) 84.

²⁴⁹ *Ibid.*

and the legislative assistance, in the form of the Children’s Act, has been enacted for such a task. In the final analysis the state has failed to meet its constitutional obligations and its international law obligations.²⁵⁰ The discussion below shows that there are options provided for in the Children’s Act that can be utilised to provide appropriate social services and care to children with emotional and behavioural difficulties.

4.5.3 The feasibility of caring for and providing protection to children with emotional and behavioural difficulties in alternative care

The Children’s Act provides for two alternative care options that can be utilised to ensure the well-being of children with emotional and behavioural difficulties, namely foster care and CYCCs.²⁵¹ As has been highlighted earlier,²⁵² the Children’s Act specifically provides that CYCCs provide therapeutic programmes to children with disabilities and in particular children with emotional and behavioural difficulties.²⁵³

4.5.3.1 Foster care

Foster care as the first port of call before placement in a CYCC allows a child to grow and flourish in a “family like environment” and ensures that the negative effects of removal are minimised.²⁵⁴ Foster care would especially assist in the prevention of the negative effects experienced by children as a result of placement in facilities that are not sufficiently equipped.

Institutionalisation particularly in inappropriate and ill-equipped facilities could have a major impact on the mental and physical health of children.²⁵⁵ There is also the risk of the children’s pre-existing conditions worsening.²⁵⁶ Children, including children

²⁵⁰ Para 4.2 and 4.3.1 above.

²⁵¹ Para 4.3.2 above.

²⁵² *Ibid.*

²⁵³ Para 4.3.2 above.

²⁵⁴ See para 4.3.2 above. It should be noted however that the foster care system is currently facing a large backlog and is overburdened due to a number of orphaned children that are cared for by relatives being placed in the foster care system. The foster care system was not meant for this purpose. Therefore, this issue will have to be dealt with by the Department of Social Development if children with emotional and behavioural difficulties are to receive the care they need. See Skelton A “Kingship Care and Cash Grants: In search of sustainable solutions for children living with members of their extended families in South Africa” (2012) *International Survey of Family Law* 333-345.

²⁵⁵ World Health Organisation “Promoting rights and community living for children with psychosocial disabilities” (2015) 39.

²⁵⁶ *Ibid.*

with disabilities, experience amongst other things poor physical health, severe developmental delays and psychological harm.²⁵⁷ Institutionalisation may cause mental health and behavioural problems due to the lack of quality relationships with a caregiver that are “characterized by confidence, support, continuity and warmth”.²⁵⁸

A form of specialised foster care service for children with emotional and behavioural difficulties would assist to prevent or minimise the impact of the above, and other, negative effects.²⁵⁹ Foster care could be used as a tool to provide therapeutic assistance in a safe environment and provide a “role model for parents in difficulty as part of family rehabilitation”.²⁶⁰

However it should be kept in mind that foster care parents must be equipped to manage and care for children with emotional and behavioural difficulties. In order for foster care placements to be successful the following must occur:

- A pool of accredited foster [parents] is identified in each community to provide children with care and protection while maintaining ties to the family, community and cultural group.
- Appropriate training, supervision, support and counseling services should be made available to foster [parents] at regular intervals before, during and after the placement.
- [Foster parents] should have the opportunity to share their opinions and influence policy, as well as to receive peer support through means such as associations of foster [parents].²⁶¹

4.5.3.2 Child and Youth Care Centres

If foster care is not a viable option then CYCCs are the next available option. The curator appointed to investigate the circumstances of A and G made a number of useful recommendations on the development of CYCCs. The curator was assisted by an expert in child care who produced a report on the “appropriate care models for

²⁵⁷ *Ibid.*

²⁵⁸ World Health Organisation (n 255 above) 40.

²⁵⁹ The Inter-Ministerial Committee on Young People at Risk referred to this as “Professional Foster Care”. This was advanced as a community based early intervention programme that targets young people with emotional and behavioural difficulties or challenges from disadvantaged backgrounds. These young people (and their families) would receive intensive support as a result of the fostering programme: Inter-Ministerial Committee on Young People at Risk “Final Report 1995-1999” (1999) 13.

²⁶⁰ World Health Organisation (n 255 above) 70.

²⁶¹ *Ibid.*

the therapeutic care of children with conduct disorder and other behavioural, psychological and emotional difficulties, within the context of South African law and practice”.²⁶² The curator refers to the expert’s report and notes that the type of care programme advanced for children with emotional and behavioural difficulties in CYCCs is the “secure care and treatment programme”.²⁶³

The secure care and treatment programme is dealt with in depth by the Department of Social Development in its “Blue Print for Secure Care in South Africa”, South Africa’s comprehensive model for secure care.²⁶⁴ Secure care centres should run according to a multi-pronged approach that addresses the social welfare and development needs of children with emotional and behavioural difficulties in a holistic and integrated manner.²⁶⁵

The secure care centre must be made up of staff who are knowledgeable, trained and able to successfully implement programmes necessary for the well-being of children with emotional and behavioural difficulties.²⁶⁶ These programmes must comprise of therapeutic, developmental, recreational, spiritual/religious, cultural and caring components.²⁶⁷ Before a child is exposed to any programme a developmental assessment must be carried out to determine their individual needs and a care plan and individual development plan must be formulated in response to this.²⁶⁸ This assessment and development of plans is important for the individual development of a child.²⁶⁹ These programmes “concentrate on cognitive restructuring, behaviour modification, self-awareness and positive self-concept”.²⁷⁰

Secure care centres further need to be designed and structures constructed or built in a manner that ensures that maximum benefit is derived from programmes

²⁶² Report of the curator ad litem (n 244 above) 99.

²⁶³ Report of the curator ad litem (n 244 above) 101.

²⁶⁴ Department of Social Development “Blue print, Minimum Norms and Standards for Secure Care Facilities in South Africa” (2010) 31.

²⁶⁵ Department of Social Development (n 264 above) 44.

²⁶⁶ Department of Social Development (n 264 above) 58-59.

²⁶⁷ *Ibid.*

²⁶⁸ Department of Social Development (n 264 above) 60.

²⁶⁹ *Ibid.*

²⁷⁰ Department of Social Development (n 264 above) 38.

provided.²⁷¹ The environment that the children are in should reflect the principles of care and protection and support the rights of the children generally.²⁷²

Children with emotional and behavioural difficulties do not need to experience the failures by the system and the state that they are currently experiencing. It is acknowledged that it is a difficult task to care for and protect children with emotional and behavioural difficulties, but it is not an impossible one. The social services and alternative care options made available by the Constitution and the Children's Act provide a solid framework from which specialised foster care services and CYCCs can be formulated. More can and should be done for these children.

4.6 RECOMMENDATIONS AND CONCLUSION

It is clear from discussion in this chapter that the right to social services for children with emotional and behavioural difficulties is being infringed by duty bearers in the most concerning way.²⁷³ International and regional law instruments, as well as the Constitution and the Children's Act, are very clear in the mandate given to the state.²⁷⁴

The state needs to firstly put more effort in establishing mechanisms that affect these children early in life. These mechanisms could include early childhood development programmes that identify and deal with emotional and behavioural difficulties. Efforts need to be made in providing families struggling to care for these children with effective support. The Children's Act, as highlighted, makes provision for such early intervention and prevention services.²⁷⁵

Planning and implementation also need to be effected to provide foster care services for children with emotional and behavioural difficulties as discussed above. Appropriate CYCCs also need to be developed or established that provide much needed care and support to children with disabilities. Such interventions would go a long way in protecting, promoting and advancing the rights and well-being of children with emotional and behavioural difficulties.

²⁷¹ *Ibid.*

²⁷² Department of Social Development (n 264 above) 54-55.

²⁷³ Para 4.4 above.

²⁷⁴ Para 4.2 and 4.3 above.

²⁷⁵ Para 4.3.2 above.

Children with emotional and behavioural difficulties, like all children with or without disabilities, have the right to be treated with dignity and equality. They have the right to receive social services that meet their needs and enhance their human potential.

CHAPTER 5: CONCLUSION

5.1 INTRODUCTION

The broad issue at the heart of this dissertation is South Africa's progress in realising the socio-economic rights of children with disabilities as a state that is bound to comply with international and regional law as well as its own Constitution.¹ The broad issue is broken down into two specific research questions that specifically address the right to basic education and the right to social services.²

The two research questions addressed by the dissertation are structured in a manner that requires research and analysis to be done firstly through exploring provisions and protections provided in international and regional instruments in order to establish the international benchmark for the fulfillment of the rights in question. They also require an exploration of provisions and protections set out in the Constitution and legislation enacted to give effect to fundamental rights set out in the international and regional instruments. The two research questions deal with the following issues:

- The first issue dealt with was whether children with disabilities have unhindered access to basic education and it was found that children do come across barriers in their access to basic education. The discussion then went into fleshing out what these barriers are and what should be done to address them.
- The second issue was on children with disabilities' right to social services, particularly children with emotional and behavioural difficulties. The dissertation examined whether children with emotional and behavioural difficulties, who have been removed from the family environment, receive appropriate social services to ensure protection from maltreatment, neglect, abuse or degradation while in the alternative care.³

¹ Para 1.1.1 above.

² *Ibid.*

³ Para 1.2 above.

The dissertation is formulated in the light of the fact that children with disabilities make up a large part of the population of South Africa and are often vulnerable to being victims of the infringement of their rights.⁴ It is therefore important to ensure that the rights of this large and often vulnerable group are preserved and protected.

The dissertation also advances the view that the correct approach to law and policy through which these children are viewed should be established. The approach advocated for is the human rights approach (as influenced by the social model of disability).⁵ The human rights approach views children with disabilities as individual human beings with fundamental rights and freedoms that must be protected. It seems appropriate at this point to convey the Constitutional Court's view of children as individual human beings:

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them ... Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood.⁶

The above statement from the Constitutional Court conveys the importance of viewing all children, including children with disabilities, as individual human beings with their own fundamental human rights.

5.2 THE HUMAN RIGHTS APPROACH TO DISABILITY

The human rights approach to disability recognises that children with disabilities should be treated as equal citizens and participants of society.⁷ It acknowledges that for attitudes to change and disabling barriers to be done away with it must be

⁴ Para 1.1.5 and para 1.1.4 above.

⁵ Para 2.3 above.

⁶ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

⁷ Para 2.4 above.

recognised that children with disabilities are entitled to their fundamental rights as equal members of society.⁸

The dissertation selects international and regional human rights instruments for discussion in as far as they relate to the protection of the right to education and social services for children with disabilities. These instruments are the CRC, the ACRWC and the CRPD. These instruments set the benchmark for South Africa's protection of the rights of children with disabilities.⁹

The international instruments all have, in a number of respects, common goals. All the instruments aim to advance respect for the inherent dignity of children with disabilities and ensure the non-discrimination of children with disabilities.¹⁰ The instruments promote the full and effective participation and inclusion of children with disabilities as well as equality of opportunity.¹¹ Lastly, they all promote the accessibility of children with disabilities in many respects. This ranges from physical accessibility into buildings and other physical structures such as schools to accessibility into different spheres of society, for example the education system and the care and protection system.¹²

The instruments are also quite different in some respects. For example, the ACRWC requires the best interests of the child be "the primary" consideration in matters concerning the child while the CRC and the CRPD do not place such a high emphasis on the influence that the best interests of the child plays.¹³ Unlike the CRC and ACRWC the CRPD requires states to respect the evolving capacities of children with disabilities.¹⁴ The ACRWC is an instrument that uniquely deals with children within the African context.¹⁵

The Constitution reflects the international conventions that South Africa is a signatory to and has an obligation to comply with.¹⁶ The Constitution explicitly provides for the protection and respect of the rights to inherent dignity, equality, non-

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Para 2.4 above.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

discrimination and provides that the best interests of the child are of paramount importance. South Africa has developed and continues to develop a number of legislative documents to respond to the CRC and the ACRWC and the recently signed CRPD as well as to constitutional obligations in a more extensive and practical manner.¹⁷

The human rights model is echoed in the international and regional instruments. The instruments confirm that children with disabilities are human beings to be treated with the requisite respect and dignity. The instruments also confirm that the fundamental rights contained therein are applicable to children with disabilities as much as they are applicable to children without disabilities. These rights must be implemented in a manner that takes into account the individual contexts and needs of children with disabilities. The same can be said for the Constitution and legislative documents which aim to protect and preserve the rights of children with disabilities in a South African context.

5.3 ACCESS TO BASIC EDUCATION FOR CHILDREN WITH DISABILITIES

The CRC, ACRWC and the CRDP all unequivocally state that children with disabilities have the right to receive basic education and to enjoy this right without any form of exclusion or discrimination.¹⁸ They place the obligation on states parties to ensure that children with disabilities have access to basic education and that this right is protected.¹⁹ This right must be enforced and applied together with the right to inherent dignity, equality of opportunity, non-discrimination and full and effective participation.²⁰ These rights affirm the view that children with disabilities should be treated as individuals and with respect.

The Constitution and the Schools Act are in most part compliant with the international and regional instruments. They acknowledge that everyone has the right and the ability to learn and increase their knowledge.²¹ The Constitution specifically places the obligation on the state to not interfere with access to basic

¹⁷ Para 2.4 above.

¹⁸ Para 3.1 above.

¹⁹ *Ibid.*

²⁰ Para 2.4.1 above.

²¹ Para 3.2 above.

education and to provide basic education.²² The right to basic education as set out in the Constitution is an unqualified right with no internal limitations; therefore, this right is immediately realisable.²³

The right to basic education is not defined in the Constitution or the Schools Act. It has also not been defined by the Constitutional Court in any judgment.²⁴ There is uncertainty as to whether it refers to school attendance for a specified period of time or the quality of education.²⁵ Legal commentary on this leans towards the latter and concludes that basic education is the acquisition of essential learning tools and basic learning content.²⁶ The Constitutional Court²⁷ will have to decide on this issue at some point in order to provide certainty on the measures that need to be complied with in order to successfully fulfil this right.

There is also no definition of what inclusive basic education means.²⁸ It is submitted that inclusive education refers to the fact that all children can and should learn and that this can be done in different settings as long as the curriculum used relates to their contexts and needs and produces significant outcomes.²⁹ Inclusive education is provided for in White Paper 6.³⁰ Below is a review of the discussion on the right to basic education for children with disabilities, the legal framework in place and implementation thereof.

5.3.1 Children with disabilities' access to basic education in South Africa

The dissertation found that children with disabilities often do not have unhindered access to basic education. This is despite the fact that international and regional law, the Constitution, legislation and policy provide the framework for this.³¹ In addition case law exists that confirms the priority to be given to the implementation of basic education.³² It should be noted that one reason for the barrier to education is the

²² *Ibid.*

²³ Para 3.2 above.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ The Constitutional Court does not currently have a case running that seems to resolve this issue.

²⁸ Para 3.3 above.

²⁹ Para 3.4 above.

³⁰ *Ibid.*

³¹ Para 3.1 and 3.2 above.

³² Para 3.4.2 above.

phased-in approach adopted by White Paper 6.³³ The White Paper 6 states that a realistic timeframe for the full implementation of inclusive basic education is 20 years.³⁴ This basically means that some children would have to wait 20 years to gain access to inclusive basic education.³⁵ This situation is further exasperated by the fact that the state is currently not meeting the deadlines set by the White Paper.³⁶ This calls into question the state's ability to comply with the 20 year time-frame. This is another issue that the Constitutional Court will have to deliberate on and determine if this "progressive realisation" mechanism is acceptable.³⁷

5.3.2 Challenges to children with disabilities' access to basic education

Despite noticeable strides being made in the implementation of inclusive basic education over the past few years,³⁸ much still remains to be done. Research indicates that a number of children with disabilities remain out of school; there is an insufficient number of full-service and special schools; and children with disabilities are incorrectly referred to special schools instead of mainstream schools.³⁹ Mainstream schools do not have the proper infrastructure to accommodate children with disabilities. Children have to contend with a lack of transport or unaffordable transport.⁴⁰ The Constitution does not explicitly guarantee free basic education and, therefore, children with disabilities sometimes cannot access schools that charge fees on top of related expenses for transport, books and school uniform.⁴¹

There is a lack of skilled teachers that are able to accommodate different learning needs in mainstream schools, full-service schools and special schools.⁴² Teachers are not able to adapt curricula in a manner that is flexible enough to accommodate the learning needs of children with disabilities.⁴³ Other issues include the fact that White Paper 6 is a broad statement of government policy and not law; funding allocated to inclusive basic education is not sufficient; and the compulsory age for

³³ Para 3.4 above.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ The Constitutional Court does not currently have a case running that seems to resolve this issue.

³⁸ Para 3.4 above.

³⁹ Para 3.4.1 above.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Para 3.4.1 above.

school attendance for children with disabilities has not been determined.⁴⁴ All of these issues point to the fact that South Africa has a long way to go in its implementation of inclusive basic education.⁴⁵

Recommendations for the improved implementation of inclusive basic education have been made in paragraph 3.5 of this dissertation. The recommendations highlight the fact that South Africa has to make improvements at policy level and the practical implementation level.⁴⁶ The policy improvements include the fact that White Paper 6, as an outdated policy document, first needs to be updated to meet the needs of the current South African context.⁴⁷ Then it needs to be given more influence through its translation from a mere expression of government policy to law that will bind duty bearers.⁴⁸ Further policy improvements include the determination, by the Minister of Basic Education, of the compulsory school going age for children with disabilities; the publication of funding norms and standards for inclusive education; and the development of a learner transport policy.⁴⁹ All of these policy improvements create mechanisms through which the state can be kept accountable in its implementation of inclusive basic education.⁵⁰

The improvements at the practical implementation level include the provision of resources to schools that need to account for the number of children with disabilities and their progress.⁵¹ Teachers should be trained and given the appropriate skills to accommodate and teach children with disabilities despite their varying and sometimes challenging needs.⁵² Norms and standards for infrastructure should be strengthened to ensure better delivery of schools as well as learning and teaching materials.⁵³

Needless to say the state has much work and planning to do in the area of inclusive education going forward. It is hoped that the state take steps to improve the

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Para 3.5 above.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

implementation and, therefore, better the educational experience of children with disabilities in South Africa.

5.4 THE RIGHT TO SOCIAL SERVICES FOR CHILDREN WITH EMOTIONAL AND BEHAVIOURAL DIFFICULTIES IN ALTERNATIVE CARE

The protection and promotion of the right to social services ensures that children with disabilities receive the special protection necessary as a result of their vulnerability.⁵⁴ This dissertation focuses on children with emotional and behavioural difficulties.⁵⁵ The individual needs of children must be the guide to the determination of what social services and support they need.⁵⁶

The dissertation confirmed that the fulfillment of the right to social services plays a role in the successful implementation of social protection.⁵⁷ Social protection aims to protect individuals from social risk and deprivation and ensures a minimum acceptable living standard for all.⁵⁸ Social services, particularly for children, contribute to this goal by providing services to promote the care and protection of children.⁵⁹ Such services include the promotion of family care; protection from abuse; neglect maltreatment and degradation; promoting the well-being of children in alternative care and services to children with special needs.⁶⁰

As with the right to basic education, international and regional instruments contain provisions promoting the right to access social services. The international instruments selected for this dissertation are the CRC, the ACRWC and the CRPD. All of these instruments, with a few structural and drafting differences, contain provisions that promote and protect the right to family life and require removal of children from families to be the last resort.⁶¹ The instruments require states parties to provide support to families; to protect children from violence, abuse, neglect and maltreatment.⁶² It is interesting to note that the CRPD requires children that have

⁵⁴ Para 4.1 above.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Para 4.2 above.

⁶² *Ibid.*

been removed from their families to be placed with their wider family or within the community to preserve the concept of family in the child.⁶³

The Constitution also provides that children have the right to social services, including the right to family care, parental care or appropriate alternative care.⁶⁴ The right to social services must also be read with the right to be protected from maltreatment, neglect, abuse or degradation.⁶⁵ Through the discussions in the dissertation one notes that the Constitution recognises that children, including children with disabilities, are in need of special care and services in order to grow and develop to their fullest extent.⁶⁶

The Children's Act was enacted to give effect to the right to social services and the above-mentioned related rights.⁶⁷ The Children's Act provides for a child-centred approach to the care and protection of children.⁶⁸ The Act makes specific mention of children with disabilities and their right to be protected from unfair discrimination.⁶⁹ The Act also makes provision for the development and implementation of early childhood development programmes and the provision of prevention and early intervention services.⁷⁰ The Act also provides for the establishment of partial care facilities and CYCCs.⁷¹ The Act also provides for the use of foster care as an alternative care option.⁷²

The above is an indication that international and regional law, as well as the Constitution and the Children's Act, appropriately legislate for the provision of social services to children in the form of care and protection. It is extremely disappointing, therefore, to see that the right to social services (and as a consequence the right to basic education) of children with emotional and behavioural difficulties are not complied with and protected by the state.⁷³ *Centre for Child Law* as well as the case

⁶³ *Ibid.*

⁶⁴ Para 4.3 above.

⁶⁵ *Ibid.*

⁶⁶ Para 4.4.1 above.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Para 4.3.2 above.

⁷² *Ibid.*

⁷³ Para 4.5 above.

studies of A and G, in chapter 4, highlight this deficiency in the implementation of the law.⁷⁴

5.4.1 Children with emotional and behavioural difficulties failed by the state

The discussion on *Centre for Child Law* and the discussions on the case studies of A and G highlight how desperate the situation is for children with emotional and behavioural difficulties.⁷⁵ The state has failed to comply with internationally and constitutionally set obligations in its inability to come up with sustainable solutions for this group of children who are in desperate need of appropriate social services.⁷⁶

There is no doubt that children with emotional and behavioural difficulties are challenging to care for, but this does not mean that the social services provided to them may be substandard. The case studies tell of children who have been sent from care institutions to mental institutions and then brought into contact with the criminal justice system because the services available were not adequate to provide the necessary intervention.⁷⁷

The dissertation highlights the fact that there is an implementation gap in the area of social services to children with disabilities when children with emotional and behavioural difficulties are left in limbo;⁷⁸ when children with emotional and behavioural difficulties are removed from family care they are placed in situations in which the proper psychological and therapeutic care and treatment is not provided.⁷⁹ This hinders their development and possible integration into society, communities and families.

The dissertation makes recommendations on the way forward for the development or establishment of appropriate alternative care services. The recommendations advance the options of “specialised foster care services” and appropriately equipped CYCCs.⁸⁰ Specialised foster care services will allow children to be cared for and nurtured in “family like” environments while ensuring that they are protected from the

⁷⁴ Para 4.4 above.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Para 4.4.3.1 above.

negative effects of institutionalisation.⁸¹ This requires training and equipping of foster parents to ensure that they are able to provide appropriate care and protection to children with disabilities and assist in the facilitation or provision of therapeutic services.⁸²

Sufficiently equipped CYCCs can also be tools used to render social services to children with emotional and behavioural difficulties.⁸³ The state needs to develop and implement plans to establish CYCCs that provide appropriate care and therapeutic services to children with emotional and behavioural difficulties.⁸⁴ The CYCCs must facilitate secure care programmes and ensure that the environments therein are suitable for the development and nurturing of children with emotional and behavioural difficulties⁸⁵ Staff in these CYCCs must be appropriately equipped and supported to meet the individual needs of the children placed in their care.⁸⁶

5.5 CONCLUSION

This dissertation has highlighted the fact that children with disabilities receive legal protection and fundamental rights in international and regional law. The Constitution and the accompanying national legislation reflect these legal protections and fundamental rights and formulate them in a manner that applies to children in the South African context.

The disconnect creeps in at the implementation stage. This dissertation has shown a glimpse of how many of the legal protections and fundamental rights are being implemented in the area of socio-economic rights of children with disabilities. The socio-economic rights focused on are the right to access basic education and the right to social services. The dissertation has shown that appropriate and much needed implementation is lacking. This leaves children with disabilities vulnerable to a number of rights infringements that can be avoided.

In order for a society to say it is truly equal, the most vulnerable need to be lifted up, protected and assisted to make strides for personal development and successful

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Para 4.4.3.2 above.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

participation in society. This dissertation shows that the state needs to be more deliberate and strategic in its planning and execution of mechanisms to ensure that the socio-economic rights of children with disabilities are realised.

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BIBLIOGRAPHY

6.1 BOOKS

American Psychiatry Association *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatry Publishing: Arlington 2013)

Barnes C and Mercer G (eds) *Exploring Disability: A Sociological Introduction* (Polity Press: Cambridge 2010)

Brand D and Heyns C (eds) *Socio Economic Rights in South Africa* (Pretoria University Law Press: Pretoria 2005)

Currie I and De Waal J (eds) *The Bill of Rights Handbook* (Juta: Cape Town 2013)

Freeman M (ed) *A Commentary on the Convention on the Rights of the Child: Article 3: The Best Interests of the Child* (Martinus Nijhoff Publishers: Leiden 2007)

Gose M *The African Charter on the Rights and Welfare of the Child* (Community Law Centre: Cape Town 2002)

Hodgkin R and Newell P (eds) *Implementation Handbook for the Convention of the Rights of the Child* (UNICEF: Switzerland 2007)

Jary J and Jary D (eds) *Collins internet-linked dictionary of sociology* (Collins: United Kingdom 2000)

Liebenberg S *Socio-economic rights: adjudication under a transformative constitution* (Juta: Cape Town 2010)

Nolan A *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing: Oxford 2014)

Rautenbach IM and Malherbe EFJ *Constitutional Law* (LexisNexis: Johannesburg 2009)

Sadock BJ and Sadock VA *Synopsis of Psychiatry: Behavioural Sciences/ Clinical Psychiatry* (Lippincott Williams & Wilkins: New York 2003)

Schäfer L *Child Law in South Africa: Domestic and International Perspectives* (LexisNexis: Johannesburg 2011)

Woolman S (ed) *Constitutional Law of South Africa* (Juta: Cape Town 2011)

6.2 CHAPTERS IN BOOKS

Barnes C “Understanding the social model of disability” in Watson N, Roulstone A and Thomas C (eds) *Routledge Handbook of Disability Studies* (Routledge: Oxon 2012) 12

Basser LA “Human Dignity” in Rioux M, Basser LA and Jones M (eds) *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers: Leiden 2011) 17

Bickenbach JE “Disability Human Rights, Law and Policy” in Albrecht GL, Seelman KD and Bury M (eds) *Handbook of Disability Studies* (Sage Publications: California 2001) 565

Boezaart T “General Principles” in Davel T and Skelton A (eds) *Commentary on the Children’s Act* (Juta: Cape Town 2007) 2-1

Boezaart T and Skelton A “From pillar to post: legal solutions for children with debilitating conduct disorder” in Grobbelaar-du Plessis I and Van Reenen T (eds) *Aspects of Disability Law* (Pretoria University Law Publishers: Pretoria 2011) 107

Bornman J “Accessing justice via key role players: A view from South Africa” in Bryen DN and Bornman J (eds) *Stop Violence Against People with Disabilities* (Pretoria University Law Press; Pretoria 2014) 41

Byrne B “Minding the gap? Children with Disabilities and the United Nations Convention on the Rights of the Persons with Disabilities” in Freeman M (ed) *Law and Childhood Studies* (Oxford University Press: Oxford 2011) 24

Combrinck H “The Hidden Ones: Children with Disabilities in Africa and the Right to Education” in Sloth-Nielsen J (ed) *Children’s Rights in Africa* (Ashgate Publishing: England 2008) 299

Gallinetti J and Loffell J “Foster Care” in Davel CJ and Skelton A (eds) *Commentary on the Children’s Act* (Juta: Cape Town 2007) 12-8

Grobbelaar-du Plessis I and Van Reneen T “Introduction to aspects of disability law in Africa” in Grobbelaar-du Plessis I and Van Reneen T (eds) *Aspects of disability law in Africa* (Pretoria University Law Press: Pretoria 2011) xxvi.

Kilkelly U “Disability and children: the Convention on the Rights of the Child (CRC)” in Quinn G, Degener T, Bruce A, Burke C, Castellino J, Kenna P, Kilkelly U and Quinlivan S *The current use and future potential of United Nations human rights instruments in the context of disability* (United Nations: New York 2002) 191

Mahery P “The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law” in Boezaart T (ed) *Child Law in South Africa* (Juta: Cape Town 2009) 309

Malherbe R “The Impact of Constitutional Rights on Education” in Boezaart T (ed) *Child Law in South Africa* (Juta: Cape Town 2009) 420

Martin P “Children’s rights to basic education: A review of South Africa’s laws and policies” in Proudlock P (ed) *South Africa’s progress in realising children’s rights: A law review* (Children’s Institute: Cape Town 2014) 99

Ngcukaitobi T “Equality” in Currie I and De Waal J *The Bill of Rights Handbook* (Juta: Cape Town 2013) 209

Nwena C “Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education” in Ngwena C, Grobbelaar du Plessis I, Combrinck H and Kamga SD *African Disability Rights Yearbook 2013* (Pretoria University Law Press: Pretoria 2013) 139.

Philpott S “Too little, too late? The CRPD as a standard to evaluate South African legislation and policies for early childhood development” in Ngwena C, Grobbelaar-du Plessis I, Combrinck H and Kamga SD (eds) *African disability rights yearbook* (Pretoria University Law Publishers: Pretoria 2014) 51

Proudlock P “Children’s Socio-economic Rights” in T Boezaart (ed) *Child Law in South Africa* (Juta: Cape Town 2009) 291

Schneider M “Disability and the environment” in Watermeyer B, Swartz L, Lorenzo T, Schneider M and Priestly M *Disability and Social Change: A South African Agenda* (Human Rights Research Council: Pretoria 2006) 8

Skelton A “Children” in Currie I and De Waal J *The Bill of Rights Handbook* (Juta: Cape Town 2013) 598

Skelton A “Constitutional Protection of Children’s Rights” in Boezaart T *Child Law in South Africa* (Juta: Cape Town 2009) 265

Skelton A and Proudlock P “Interpretation, objects, application and implementation of the Children’s Act” in Davel CJ and Skelton AM (eds) *Commentary on the Children’s Act* (Juta: Cape Town 2007) 1-33

Tobin J “Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations” in Invernizzi A and Williams J *The Human Rights of Children: From Visions to Implementation* (Ashgate: England 2011) 61

Veriava F and Coomans F “The right to education” in Brand D and Heyns C (eds) *Socio-Economic Rights in South Africa: International and Constitutional Law* (Pretoria University Law Press: Pretoria 2005) 57

Viljoen F “The African Charter on the Rights and Welfare of the Child” in Boezaart T (ed) *Child Law in South Africa* (Juta: Cape Town 2009) 331

6.3 JOURNAL ARTICLES

Akinbola BR “The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities” (2010) 10 *African Human Rights Law Journal* 457

Anderson SR “Psycho-Educational Process as Strategies for Students Presenting with Emotional and Behavioural Disorders” (2012) 2 *American International Journal of Contemporary Research* 25

Areheart BA “When Disability Isn’t Just Right: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma” (2008) 83 *Indiana law Journal* 83 181

Arendse L “The obligation to provide free basic education in South Africa: An international law perspective” (2011) *Potchefstroom Electronic Law Journal (PER)* 107

Bekink B and Bekink M “Children with disabilities and the right to education: a call for action” (2005) 1 *Stellenbosch Law Review* 125

Bhabha F “Disability equality in South Africa: Concepts, interpretation and the transformation imperative” (2009) 25 *South African Journal on Human Rights (SAJHR)* 218

Boezaart T “The Children’s Act: A valuable tool in realising the rights of children with disabilities” (2011) 74 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 264

Boezaart T “A constitutional perspective on the rights of children with disabilities” (2012) 12 *Southern African Public Law (SAPL)* 455

Breen N “Between the cracks: How the State fails to provide for and protect children with a debilitating form of conduct disorder” (2011) 13 *Article 40* 5

Clifford J “The UN Disability Convention and its impact on European Equality Law” (2011) 6 *The Equal Rights Review* 11

Du Plessis M “The social model of disability, rights discourse and the impact of South Africa’s Education White Paper 6 on access to the basic education system for persons with severe or profound intellectual impairments” (2013) 17 *Law, Policy & Development* 202

Jones M and Marks LAB “Beyond the Convention on the Rights of the Child: The rights of children with disabilities in international law” (1997) 5 *The International Journal of Children’s Rights* 177

Kayess R and French P “Out of the darkness into light? Introducing the Convention on the Rights of Persons with Disabilities” (2008) 8 *Human Rights Law Review* 1

Kruger P “A Critical Appraisal of Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa 2011 5 SA 87 (WCC)” (2015) 18 *Potchefstroom Electronic Law Journal (PER)* 756

Lloyd A “A theoretical analysis of the reality of children’s rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child” (2002) 1 *African Human Rights Law Journal* 11

Mezmur B “The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?” (2008) 23 *Southern African Public Law* 1

Murungi LN “Inclusive basic education in South Africa: issues in its conceptualisation and implementation” (2015) 18 *Potchefstroom Electronic Law Journal (PER)* 3160

Murungi N “The duty to provide basic education for children with severe and profound intellectual disabilities” (2011) 12 *ESR Review: Economic and Social Rights in Africa* 10

Quinn G “A short guide to the United Nations Convention on the Rights of Persons with Disabilities” (2009) *European Yearbook of Disability Law* 89

Rosa S and Dutschke M “Child Rights at the Core: The Use of International Law in South African Cases on Children’s Socio-Economic Rights” (2006) 22 *South African Journal of Human Rights (SAJHR)* 224

Simbo C “Defining the term basic education in the South African Constitution: An international law approach” (2012) 16 *Law, Democracy and Development* 162

Skelton A “How far will the courts go in ensuring the right to basic education?” (2012) 27 *Southern African Public Law (SAPL)* 392

Skelton A “Girls’ Socio-Economic Rights in South Africa” (2010) 26 *South African Journal of Human Rights (SAJHR)* 141

Smith A “Equality constitutional adjudication in South Africa” (2014) 14 *African Human Rights Law Journal* 609

Stewart L “Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others” (2008) 24 *South African Journal of Human Rights (SAJHR)* 472

Viljoen F “Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child” (1998) 31 *Comparative and International Law Journal of South Africa* 199

6.4 LEGISLATION

The Children’s Act 38 of 2005

The Child Justice Act 75 of 2008

The Constitution of the Republic of South Africa, 1996

The Criminal (Sexual Offences and Related Matters) Amendment Act 32 of 2007

The Schools Act 84 of 1996

The Social Assistance Act 13 of 2004

6.5 CASE LAW

Centre for Child Law and Others v MEC of Education, Gauteng, and Others 2008 (1) SA 223 (2)

Fraser v Children's Court 1997 2 BCLR 153 (CC)

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

Juma Masjid Primary School v Essay (Centre for Child Law as Amici Curiae) 2011 7 BCLR 651 (CC)

Khosa and Others v The Minister of Social Development and Others 2004 (6) SA 505 (CC) *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703 (CC)

Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC)

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)

Nyathi v MEC for the Department of Health, Gauteng 2008 (5) SA 94 (CC)

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)

S v M 2008 (3) SA 232 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)

Western Cape Forum for Intellectual Disability v The Government of the Republic of South Africa 2011 (5) SA 87 (WCC)

6.6 POLICY DOCUMENTS

Department of Basic Education “Norms and Standards Regarding Language Policy published in terms of section 6(1) of the South African Schools Act” (1996)

Department of Education “Education White Paper 6, Special Needs Education: Building an Inclusive Education and Training System” (2001)

Department of Social Development “Blue print, Minimum Norms and Standards for Secure Care Facilities in South Africa” (2010)

Department of Social Development “White Paper on the Rights of Persons with Disabilities” (2015)

6.7 INTERNATIONAL INSTRUMENTS

African Charter on the Rights and Welfare of the Child, 1981

Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, 1993

United Nations Convention on the Rights of the Child, 1990

United Nations Convention on the Rights of Persons with Disabilities, 2006

United Nations International Covenant on Economic, Social and Cultural Rights, 1976

6.8 GENERAL COMMENTS

Committee on the Rights of the Child, General Comment 1: 'The aims of education' (2001)

Committee on the Rights of the Child, General Comment 9 'The rights of children with disabilities' (2006)

Committee on Economic, Social and Cultural Rights, General Comment 13: 'The right to education' (1999)

6.9 REPORTS

Catholic Parliamentary Liaison Office "Briefing Paper 396: Inclusive Education: Are we there yet?" (2015)

Department of Social Development "Integrated National Strategy - The Right to Belong and Participate: Support Services to Children with Disabilities" (2009)

Department of Social Development "Transforming the present – Protecting the future: Report of the Commission of Inquiry into a Comprehensive System of Social Security for South Africa" (2002)

Department of Women, Children and People with Disabilities "Baseline country report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities in South Africa" (2013)

Department of Women, Children and People with Disabilities, Department of Social Development, The United Nations Children's Fund "Children with Disabilities in South Africa: A situation analysis 2001 – 2011" (2012)

Dutschke M "Defining children's constitutional right to social services" *Children's Institute Rights Brief* (2007)

Dutschke M and Monson L "Children's constitutional right to social services" in Proudlock P, Dutschke M, Jamieson L, Monson L and Smith C (eds) *South African Child Gauge 2007/2008* (2008)

Human Rights Watch "Complicit in Exclusion: South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities" (2015)

Inter-Ministerial Committee on Young People at Risk "Final Report 1995-1999" (1999)

Lansdown AB "Using the Human Rights Framework to promote the rights of children with disabilities: An analysis of the synergies between CRC, CRPD and CEDAW" (2009)

Lake L and Pendlebury S "Children's right to basic education" in S Pendlebury, L Lake and C Smith (eds) *South African Child Gauge 2008/2009* (2009)

PACER Centre "What is An Emotional or Behavioral Disorder?" (2006) *Action Information Sheet*

Pendlebury S "Meaningful access to basic education" in Pendlebury S, Lake L and Smith C (eds) *South African Child Gauge 2008/2009* (2009)

Report of the *curator ad litem* in the case of *Centre for Child Law v MEC Health and Social Development, Gauteng North Gauteng High Court case no 37850/2010*

Save the Children "See me, Hear me: A guide to using the UN Convention on the Rights of Persons with Disabilities to promote the rights of children" (2009)

Statistics South Africa "Census 2011: Profile of persons with disabilities in South Africa" (2014)

Statistics South Africa “Statistical Release P0318: General household survey 2013” (2014)

Department of Basic Education “Report on the implementation of Education White Paper 6 on inclusive Education: An overview for the period 2013-2015” (2015)

South African Law Commission “Discussion Paper 103: Review of the Child Care Act” (2002)

United Nations Education, Scientific and Cultural Organisation (UNESCO) “Guidelines for Inclusion: Ensuring Access to Education for All” (2005)

United Nations Educational, Scientific and Cultural Organisation (UNICEF) “Using the human rights framework to promote the rights of children with disabilities, discussion paper: An analysis of the synergies between CRC, CRPD and CEDAW” (2009)

United Nations Educational, Scientific, Cultural Organisation (UNESCO) “World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs” (1990)

United Nations Educational, Scientific, and Cultural Organisation “Changing Teaching Practices: using curriculum differentiation to respond to student’s diversity” (2004)

United Nations Special Rapporteur on the rights of persons with disabilities “Report of the Special Rapporteur on the rights of persons with disabilities on the right of persons with disabilities to social protection A/70/297” (2015)

World Health Organisation and the World Bank “World Report on Disability” (2011)

World Health Organisation “Promoting rights and community living for children with psychosocial disabilities” (2015)

6.10 THESIS

Van Staden AF *A strategy for the employment of persons with disabilities* PhD thesis (2011) University of Pretoria

6.11 INTERNET SOURCES

Centers for Disease Control and Prevention “Washington Group on Disability Statistics” www.cdc.gov/nchs/washington_group.htm (accessed 09 August 2015)

Disability Etiquette Handbook of the City of San Antonio <http://www.sanantonio.gov/DAO/PublicationsandMaps/DisabilityEtiquetteHandbook.aspx#13028592-disabilities> (accessed 18 July 2015)

Inclusive Schools Network “Using multi-level instruction for a classroom of diverse learners” <http://inclusiveschools.org/using-multi-level-instruction-for-a-classroom-of-diverse-learners/#sthash.c9rQHRGg.dpuf> (accessed 19 January 2016)

INDEX “Disability-Friendly terminology” <https://www.disabilityinfo.org/mnip/db/fsl/FactSheet.aspx?id=77> (accessed 18 July 2015)

Mail and Guardian “No place for disabled children in KZN’s rural schools” <http://mg.co.za/article/2014-10-17-no-place-for-disabled-children-in-kzns-rural-schools> (accessed 05 November 2015)

Mail and Guardian “Struggle continues for disabled children” <http://mg.co.za/article/2015-02-06-struggle-continues-for-disabled-children> (accessed 05 November 2015)

Northern Officers Group “Defining impairment and disability” <http://disability-studies.leeds.ac.uk/files/library/Northern-Officers-Group-defining-impairment-and-disability.pdf> (accessed 18 July 2015)

Office of the President “White Paper: Integrated National Disability Strategy” (1997) 5 http://www.gov.za/sites/www.gov.za/files/disability_2.pdf (accessed on 15 July 2015)

Parliamentary monitoring group website Women in the Presidency Committee meeting 01 March 2011 “South Africa’s compliance with UN Convention on Rights of Persons with Disabilities and Rights of Children: input by Civil Society” <https://pmg.org.za/committee-meeting/12656/> (accessed on 31 October 2015)

People with Disability Australia (PDWA) “Terminology used by PDWA”
<http://www.pwd.org.au/student-section/terminology-used-by-pwda.html> (accessed 18 July 2015)

SouthAfrica.info “Provincial Government”
<http://www.southafrica.info/about/government/govprov.htm#.VmVYp3YrLIW> (accessed on 04 December 2015)

United Nations Educational, Scientific and Cultural Organisation (UNICEF) “World Education Forum 2015, 19-22 May 2015, Incheon, Republic of Korea: Equitable and inclusive quality education and lifelong learning for all by 2030”
<http://en.unesco.org/world-education-forum-2015/5-key-themes/right-education>
(accessed on 28 November 2015)

United Nations Statistics Division “Washington Group on Disability Statistics”
unstats.un.org/unsd/methods/citygroup/washington.htm (accessed 09 August 2015)