

PROJECT 28

CHILDREN'S INSTITUTE, UNIVERSITY OF CAPE TOWN

Defining children's constitutional right to social services

By Mira Dutschke

A Project 28 Working Paper
July 2006



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Foreword on *Project 28*

South Africa ratified the United Nations Convention on the Rights of the Child in 1995 and, a year later, the democratic Constitution was adopted. In addition to recognising everyone's fundamental human rights, the Bill of Rights in the Constitution contains a separate children's clause – Section 28 – which echoes the same rights for children, but uses stronger wording.

This construction has been interpreted by child rights advocates to mean that there is a basic package of benefits and services to which all children are entitled and that the provision of these benefits and services for children should be prioritised by the government in its overall programme of reform and delivery. These include basic health-care services, basic nutrition, shelter and social services. Section 29 in the Constitution also guarantees every child the right to basic education.

While the Bill of Rights contains clear rights for children, and child rights activists motivate strongly for a reform agenda which prioritises children, there is still uncertainty as to:

- how children's rights should be interpreted,
- what the content of each right is,
- what the extent and nature of the obligations placed on the government are, and
- how this can be translated into practical delivery.

The Children's Institute initiated *Project 28* in 2004 to contribute to the debate towards greater clarity on these questions. The project is aimed at elaborating on the meaning of children's socio-economic rights, particularly with regards to the nature and extent of government's obligations to children. The production of working papers is one of the methods we have adopted to further the project's aim to promote debate.

This working paper elaborates on the meaning of children's constitutional right to social services in section 28(1) (c) of the South African Bill of Rights.

Children's right to social services is a somewhat neglected right. It is hardly ever referred to in policy or legislation, and few legal writers have written about its meaning. The following two examples of national policy and law processes illustrate how the right to social services tends to be neglected.

The Department of Social Development in early 2006 released the *Service Delivery Model for Social Services*. The goal of the *Model* is to 'provide a comprehensive national framework that clearly sets out the nature, scope, extent and level of social services, and which will form the basis for the development of appropriate norms and standards for service delivery'. However, the *Model* does not mention section 28(1)(c) – children's right to social services – nor does it outline the State's obligations in relation to the right.

The first Children's Bill was passed by Parliament in December 2005 and signed by the President in June 2006. The new Children's Act No 38 of 2006 will however only come into force in 2008. The second Bill, the Children's Amendment Bill, will be tabled later in 2006 for debate and passage. Thereafter, a final Children's Act will replace the 1983 Child Care Act. This new law will provide the primary legal framework for the realisation of the right to social services.

However, when the first Bill was tabled in January 2004, it did not refer to the right to social services. This omission was highlighted through the public participation in the parliamentary process, and Parliament subsequently decided to amend the Bill to refer explicitly to the right to social services in the preamble and objects clause. This amendment brings about a clear recognition that the Children's Bill is aimed at giving effect to the right to social services. However the new challenge is to ensure that the substantive clauses in the second Bill do in fact provide the necessary legislative framework for the realisation of the right.

This working paper provides a useful analysis of the meaning of the right that will assist in highlighting the importance of the right and in assessing whether new law and policy adequately furthers the endeavour towards the full realisation of the right.

If you would like to send us comments on the arguments put forward in the paper, please contact Mira Dutschke on mira@rmh.uct.ac.za.

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Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
GEAR	Growth, Employment and Redistribution policy
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
MTCT	Mother-To-Child Transmission (of HIV)
NCRC	National Children's Rights Committee
NGOs	Non-Governmental Organisations
RDP	Redistribution and Development Programme
TAC	Treatment Action Campaign
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child

Chapter 1: Introduction

The South African Constitution¹ marks a break with the apartheid system, which legally sanctioned inequality and discrimination. Apartheid policies permeated every aspect of life, including the welfare system. During apartheid, South Africa operated under a 'residual model' of social welfare.² This meant that the State only provided minimal assistance to individuals or families when the 'normal' safety nets such as the family and the community had failed. Furthermore, the welfare system resources were allocated in a racially skewed manner, according to apartheid policies.³ Overall the welfare system did not assist to alleviate the social problems caused by apartheid; instead it worked towards maintaining the *status quo*.

In the climate of political change, social workers in the early 1990s started to articulate that many social ills that they were fighting were directly related to poverty and the apartheid system. They realised that, through the social services they delivered, they could play a role in addressing these underlying causes rather than just the symptoms.⁴ Such proposals for reform were strongly influenced by the writings of James Midgley, who advocated for a 'developmental approach' to social welfare – this approach addresses the issues of poverty by combining aspects of social and economic development.⁵ This approach formed the basis of the *White Paper for Social Welfare*.⁶

The problems of inequality and poverty also influenced the drafters of the new Constitution as they committed the State to bringing about far-reaching socio-economic reforms. The Constitution entrenches the right of access to adequate housing⁷, health care services, sufficient food and water, and social security⁸. These socio-economic rights are to be implemented progressively as resources become available. The Constitution also contains a strongly worded children's rights clause which provides for a mixture of civil, political and socio-economic rights. Children have, for example, the right to family or parental care or to appropriate alternative care when removed from the family environment⁹; the right to be protected from maltreatment, abuse and neglect¹⁰; and the right to basic nutrition, shelter, basic health care services and social services¹¹. The socio-economic rights of children are phrased as basic rights that are free from the limitations of 'progressive realisation' and 'the availability of resources'.

¹ The Constitution of the Republic of South Africa Act 108 of 1996.

² AJ Bernstein 'Redefining Social Work's Emphasis on the 'Social': the Path to Development' (1995) 38 *International Social Work* 53-67, 57; W McKendrick 'The Future of Social work in South Africa' (1990) 26 *Maatskaplike Werk/ Social Work* 10-18, 11; L Patel & C de Beer *Transforming Health and Welfare Services* (1990) Paper presented at the Association for Sociology in South Africa, University of Stellenbosch.

³ P Rankin 'Developmental Social Welfare: Challenges Facing South Africa' (1997) 33 *Journal for Social Work* 184-192, 184.

⁴ L Patel 'The challenges of Restructuring Social Welfare in Post Apartheid South Africa' (2003) 15 *The Social Work Practitioner Researcher* 1-11, 3.

⁵ Presentation by Jackie Loffell, Children's Institute meeting on social services, 2 November 2004. See also J Midgley 'Strategies for Social Development' in J Midgley (ed) *Social Development: The Developmental Perspective in Social Welfare* (1995) 102-137, 134.

⁶ *White Paper for Social Welfare of 1997*, <http://www.polity.org.za/govdocs/white_papers/social971.html>.

⁷ Section 26.

⁸ Section 27.

⁹ Section 28(1)(b).

¹⁰ Section 28(1)(d).

¹¹ Section 28(1)(b).

1.1 Research problem

The focus of this paper is on children's right to social services in the context of the welfare reform initiated by the Constitution¹² and the *White Paper for Social Welfare*. It will be argued that the Constitution – through the entrenchment of the socio-economic rights together with children's right to social services; the right to family or parental care; and the right to be protected from abuse and neglect – mandates a different approach to social welfare from the one that existed during the apartheid regime.

The developmental approach to social welfare advocated for by Midgley was very attractive as it was clear that the resources that were available to the welfare sector would not need to be increased.¹³ Since the developmental approach to social welfare focuses on interventions, which link economic and social development, this approach to social welfare is said to reduce State dependence and increase people's power to get themselves out of poverty.

Children are, however, by their very nature dependent on adults and the idea of linking social development with economic development therefore needs to be rethought in relation to children. Economic independence cannot be applied to children by themselves. At the same time, it must be noted that the right to social services is the only socio-economic right that exclusively applies to children. The right of access to adequate housing that applies to everyone, for example, has the mirror right of shelter applicable to children. The right to social services has no mirror right that applies to everyone. This implies that the definition of social services should come from a child rights perspective.

Defining children's right to social services in the context of the welfare reform initiated by the Constitution and the *White Paper for Social Welfare* is somewhat challenging, for two reasons. The first problem is that, since the start of the democratic dispensation, terms such as 'social welfare', 'social development' and 'social services' have not been used consistently by the different role-players in the development of laws and policies. The second problem is that concepts such as 'developmental social welfare' tend to exist on paper only and often do not translate into practice.¹⁴ These two issues are possibly related. For policy and law to become an applied reality, the necessary budget has to be attached to effect the transformation. The Treasury, however, is also affected by the misconceptions surrounding the terms and therefore does not allocate the necessary resources to affect the changes that are envisaged in policies. In the meantime protection services for children and other vulnerable groups have become increasingly side-lined and are now in a state of disarray.

A possible way forward explored in this paper is to re-conceptualise the key terminology, using the Constitution as a starting point. As explained earlier, the Constitution contains an array of economic, social and cultural rights. The right to social services is listed amongst these. Even though all the rights in the Bill of Rights have to be read together and are understood to be mutually supportive of each other¹⁵, it would not make sense to include a specific right to social services if it was

¹² This paper will touch on the drafting process of both the interim and the final Constitution.

¹³ Patel op cit note 4, 7.

¹⁴ Personal communication, J Loffel, 8 May 2006 [unpublished on file with the Children's Institute].

¹⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), 34.

intended to deal with issues covered by other socio-economic rights. Therefore, from a legal point of view, children's right to social services has to mean something different than the right of access to social security, for example.

1.2 Definitions of key concepts

The key purpose of this paper is to define the terminology surrounding social welfare, social development and social services from a constitutional point of view. To illustrate the confusion surrounding these terms, some problematic aspects on the usage of these terms will be set out in the paper.

The *White Paper for Social Welfare* uses the term 'social welfare' to refer to the overarching system in which social services and other programmatic interventions in relation to housing, health and education for example run alongside each other to achieve optimal social development, social justice and social functioning. It seems to use the term 'social welfare' to cover social services and social security. 'Social welfare services', which seems to be used synonymously with 'social services', thus run parallel to other interventions such as housing, health and education. Collectively, these interventions are aimed at achieving social development.

These definitions of the terms and the way they are interpreted in this paper are contrasted by other documents. The use of the terms as they are set out here are also not how they are used in practice. The Financing Policy¹⁶ for example uses the terms differently. This is problematic because the Financing Policy is meant to facilitate the transformation of the welfare sector as set out in the *White Paper*.¹⁷ This policy states that 'welfare services' are part of a broad menu of 'social services' aimed at enhancing the quality of lives of South Africans. The policy therefore seems to suggest that 'social services' is the overarching term of which 'social welfare' is one 'component'. Within this definition housing, education, and health services are 'social services' alongside 'welfare services'.

The Constitution does not provide clarity on the use of the terms. The term 'welfare' is not used in the Bill of Rights. As explained earlier, the Bill of Rights, which is chapter 2 of the Constitution, refers to 'social services' together with other rights such as the right to shelter, health care services, nutrition, education, and social security. This indicates that social services must mean something different to what is covered by the other socio-economic rights. The Bill of Rights would therefore support the definition of terms used in the *White Paper* in that 'welfare' could be used as the overarching term that includes, but is not limited to, social services.

The term 'welfare' is, however, used differently in the Schedules to the Constitution. Schedule 4 lists the areas of concurrent national and provincial legislative competences. Education, health services, housing and 'welfare services' are listed in Part A of the Schedule. This raises the question whether 'welfare services' refers to 'social services' as is mentioned in section 28 in the Bill of Rights. If 'welfare' refers to the overarching delivery of a range of services it doesn't make sense that it would be listed alongside those services such as housing, education and health services. The Constitution therefore does not clarify the meaning of the terms.

¹⁶ Notice 463 of 1999.

¹⁷ L Patel *Social Welfare and Social Development in South Africa* (2005) 117.

To complicate matters, the Treasury uses the term 'welfare' when referring to the core business of the Department of Social Development. It is important to set out and agree on what the core business of that department is because many government representatives do not have 'welfare services' in mind when talking about social services. In the national budget, the term 'social services' is used to refer to arts and culture, education, health, labour, social development and sport and recreation.¹⁸ 'Social development' is used in the budget as including 'social security' and 'welfare'. Expenditure on social security and social assistance makes up 90% of the overall welfare budget.¹⁹ While this contributes significantly to poverty reduction, it has crowded out spending on welfare services, which accounts for only 9% and in some provinces only 5% of the overall budget.²⁰

The welfare services component in the national budget is therefore severely under-funded. It will not be able to realise the policy aspirations of a developmental welfare approach set out in the *White Paper* and other policy documents. It is also unlikely that children's right to social services can be realised when the necessary budget is not attached.

As a starting point, this paper uses the term 'social services' to refer to interventions that help people deal with social problems arising from social, economic or political change. The term 'social services' is therefore used as it is traditionally understood, which is that social services are one arm of a welfare system. Social services in this context run alongside other interventions such as social security, social assistance and other programmes. For the sake of clarity, this paper refers to such programmes as 'welfare programmes' in the sense that they refer to programmatic interventions in a 'welfare state'. In other words, social services and other welfare programmes run alongside each other to make up the welfare system of a country as a whole.²¹ 'Welfare' in this sense refers to the general and overall state of well-being of the people.²²

The extent to which a State is involved in protecting and promoting people's welfare is ultimately a political decision. The social services and welfare programmes provided by the State will differ according to what type of a welfare system the State operates. Since South Africa is a constitutional democracy,²³ the type of welfare system and therefore the types of services that it delivers are no longer only a choice of politics alone. The Constitution mandates an active promotion of the 'welfare' of the people through the incorporation of fully justiciable socio-economic rights. The crucial question addressed in this paper is what type of 'social services' are covered by children's right to social services in the context of the constitutional rights to other welfare programmes? By defining the type of welfare model that the

¹⁸ Treasury *National Medium Term Expenditure Estimates* (2006), <<http://www.treasury.gov.za>>.

¹⁹ Loffel op cit note 14.

²⁰ J Streak *Budget Brief No 158: Provincial Budgets for Developmental Social Welfare Services over MTEF 2005/6 – A vulnerable child perspective* (2005) Children's Budget Unit IDASA, 14, <<http://idasa.org.za>>.

²¹ A J Bernstein 'Social Work and a new South Africa: Can Social Workers meet the Challenge?' (1991) 27 *Maatskaplike Werk/ Social Work*, 222-230, 222; Bernstein op cit note 2, 45;

M Grey 'The role of Social Workers in Developmental Social Welfare: Is there a place for them?' (1996) 2 *Social Work Practice* 8-13, 9; McKendrick op cit note 2, 10; Patel op cit note 4, 2.

²² A Lombard 'Developmental Social Welfare in South Africa: A Theoretical Framework' (1996) 32 *Social Work/ Maatskaplike Werk* 2, 163.

²³ See section 2 of the Constitution.

Constitution mandates, the type of social services – delivered under the auspices of children's right to social services – can be deduced.

The drafters of the Constitution and the *White Paper* were concerned about the poverty and marginalisation of vulnerable groups of people. Such issues are symptoms of what Midgley calls 'distorted development'.²⁴ This phenomenon occurs when the benefits of economic development do not reach the poor and needy. This is happened during apartheid South Africa and it is this state of affairs that the Constitution is designed to address. The developmental model of social welfare is in theory the only model that addresses both social and economic development.

The introduction of the concept of developmental social welfare in debates about a new welfare system has arguably added to the considerable confusion explained earlier. The term 'welfare' has over the years carried a lot of stigma and people have tried to move away from that concept. In fact, what is today called the Department of Social Development started off as the Department of Social Welfare and Population Development. The move away from the 'welfare' origins of the department has been argued to have increased existing confusion about its core functions. The concept of social development, and the notion that it is directed towards poverty alleviation by making people economically independent, led some officials to believe that the main job of social services was to enable the receivers of grants to become independent of social security payments.²⁵

This paper incorporates the notion of developmental social welfare because it can be a powerful tool in the fight against poverty. The concept of economic independence however cannot be applied to children as was explained earlier. The definition of 'social services' in this paper therefore incorporates the notion that South Africa's welfare system in fact commits the State to provide developmental welfare services to its people, but that this does not mean that those are the only types of services that the State is meant to provide.

1.3 Literature review, methodology and scope

The literature consulted for this paper has not been limited to legal writings but also included the writings of social workers, practitioners and academics published around the time of the drafting of the Constitution and the *White Paper* were also considered.

Legal literature on this topic is fairly scarce. The full scope of this right has not yet been defined and the right to social services itself has not come to the attention of many legal authors. To date, only a few authors have attempted to grapple with the interpretation of this right. Of these, the work of Professor Julia Sloth-Nielsen at the University of the Western Cape is particularly influential.²⁶ Furthermore, there is no consensus on the terminology used in relation to the right to social services. The authors of such legal literature have however defined the problem and suggested various ways in which the interpretation of this right could be taken forward. They have thereby created the foundation on which the arguments in this paper are built.

²⁴ J Midgley 'Involving Social Work in Economic Development' (1996) 39 *International Social Work* 13-25, 15.

²⁵ Loffel op cit note 14.

²⁶ J Sloth-Nielsen 'The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*' (2001) 17 *SAJHR* 210-231.

Legal literature on socio-economic rights in South Africa has also been consulted in writing this paper because it guides the understanding of the State's obligations in relation to socio-economic rights, the minimum core of the rights and other related issues. Most of this literature however dealt with general socio-economic rights and not children's socio-economic rights in particular. Children's socio-economic rights have come to the attention of the Courts on only a few occasions and the Courts have not directly discussed or defined the right of children to social services. The Courts have however had a chance to deal with socio-economic rights in general and, in the process, have made some statements about the socio-economic rights of children in particular. The paper discusses these cases and addresses the implications of the judgments for children's right to social services.²⁷

International law is also considered quite extensively in this paper because, firstly, the Constitution states that an interpretation of any right in the Bill of Rights must consider international law. Secondly, it is considered because the drafters of the Constitution placed heavy reliance on international law – in particular the United Nations Convention on the Rights of the Child (UNCRC). The different international law treaties such as the UNCRC, the African Charter on the Rights and Welfare of the Child (ACRWC), the Universal Declaration of Human Rights and the International Convention on Economic Social and Cultural Rights (ICESCR) were therefore considered. Related legal literature has also been considered to gain an understanding of the context of the rights in the various treaties. Due to the strong international law focus, all the material written by the implementation bodies (including general comments), the guidelines that were created to assist states in writing their reports, and the individual country reports, have been considered.

The paper also looks at the *Travaux Préparatoires* of the Constitution because helpful insights can be gained from the debates and discussions that took place at that time. Different archives materials that have guided the interpretation of the right to social services were consulted. Such materials have provided insight into the drafters' intention in relation to this right. Interviews conducted with people that were involved in the Constitution-drafting process were also used to gain insight into the critical debates at the time.²⁸ Furthermore, writers such as James Midgley began to develop the idea of developmental social services around the time that the final Constitution was drafted. These writers had a lot of influence on both the drafters of the Constitution and the *White Paper for Social Welfare*. Literature by these writers is therefore also relevant to understand the context and the purpose of the right to social services and was consulted in writing this paper.

Social services are traditionally considered to be interventions by social workers and other social service professionals. Since there is a large gap on this topic in the legal literature, the writings of different schools of social work have been considered to understand the terminology used in these circles. These writings however do not focus on children in particular but rather talk about the welfare systems in broader terms.

²⁷ In particular the case of *Government of the Republic of South Africa and Others v Grootboom and Others* op cit note 15; *Minister of Health and Others v TAC and Others* (1) 2002 (10) BCLR 1033 (CC) and *Centre for Child Law & Another v Minister of Home Affairs and Others* Case No: 22866/ 04.

²⁸ The interviews were conducted by the author and Paula Proudlock specifically for this paper and related *Project 28* work of the Children's Institute, UCT.

1.4 Significance of the study

This study is very relevant at the moment because of changes taking place in the government. The budget of the Department of Social Development currently is meant to provide for social security and social services – the former taking up to 90% of the budget. Furthermore, a new social security agency has been formed separate to the Department of Social Development to deal exclusively with social security.²⁹ This means that the department's budget will in future be exclusively dedicated to social services.

Politically it is therefore important to determine the package of services that the department's budget is meant to provide for. Therefore, as a starting point, the full scope and content of the right to social services should be defined. Only if the extent of this constitutional right is actually known can it be determined if the government is fulfilling its constitutional and international legal obligations.

Furthermore, it is also important to define the right to social services because Parliament is currently finalising the Children's Bill.³⁰ This piece of legislation is meant to give effect to the right of children to social services, family care and appropriate alternative care and to the prevention of abuse, neglect and degradation. It is therefore also important to define the full scope and extent of the right to social services to be able to assess if the Children's Bill lives up to the constitutional rights it is meant to give effect to.

There are many children in dire need of social services, especially early preventative mechanisms and a comprehensive child protection system. Most of the services that children need are currently delivered by non-governmental organisations (NGOs) or other community organisations. However, these organisations tend to have severe resource constraints and also lack an overarching co-ordinating structure. As a result, responses to calls for help received by NGOs can take anything from weeks to months, if they are ever followed up. The child protection system is constantly functioning in crisis mode and the children bear the consequences of this.

A clear definition of the right to social services and of the obligations borne by the State therefore has the potential to addressing these above-mentioned issues.

²⁹ The agency was created in terms of the South African Social Security Agency Act No. 9 of 2004.

³⁰ The Children's Bill is a 'mixed Bill' in terms of the Constitution. The first part of the Bill falls under section 75 of the Constitution, which deals with Bills that do not affect provinces. This part of the Bill was passed by Parliament in December 2005 [B70D-2003] and signed by the President in June 2006. The second part of the Bill is classified under section 76 of the Constitution, which deals with Bills that also affect the provinces. This Bill will be tabled in Parliament later in 2006 and deals substantially with the basket of services that are meant to give effect to the right to 'social services' such as foster care, early childhood development, children's homes, and primary prevention services. See L Jamieson & P Poudlock (eds) *Children's Bill Progress Update, 13 March 2006*. Children's Institute, University of Cape Town, <<http://www.ci.org.za>>.

Chapter 2: Different approaches to social welfare

2.1 Introduction

Traditionally, social services are regarded as the service delivery arm of a welfare system, running alongside other interventions such as housing, health and social security programmes. Over the years, different types of welfare systems have developed, while the type of social services that a State delivers to its people depends on the type of welfare system it has chosen to adopt.

This chapter sets out the historical roots of social services and describes the different approaches to social welfare that have subsequently developed. This will illustrate the type of social welfare system that South Africa used in the past and the type of social welfare system it decided in principle to adopt for the future. The chapter is purely descriptive of the policies and laws. It should be noted that what is set out here is what exists on paper. What happens in practice is not described or commented on in this chapter.

This section will show that the development of the social welfare system for the democratic South Africa aligned itself with international and local developments, which will be discussed in the following chapters. These developments reflect the idea that the aim of social welfare is to increase the independence of the individual. The developmental social welfare model is the only welfare model that seeks to combine economic and social development and is the most appropriate model for a country like South Africa.

Poverty is, however, far from the only cause of social problems. Child abuse and neglect do not disappear in wealthy societies. While poverty reduction is extremely important it is also necessary that services address the psycho-social dynamics. Other causes of child abuse and neglect in South Africa, such as the systematic family and community breakdown that was legally sanctioned by the apartheid system, also have to be addressed by social services interventions.

This chapter looks at two policy documents that set out welfare service delivery for post-apartheid South Africa, namely the *White Paper for Social Welfare* and the *Service Delivery Model*. The approaches used in the *White Paper* are relevant because they were intended to inform the envisaged restructuring of the welfare system by including a range of socio-economic rights contained in the new Constitution.¹ The drafters of the *White Paper* were greatly influenced by the new Constitution², which marked the birth of a unified nation and resonated with the vision for the new values and missions of social work. The terminology used in the *White Paper* is therefore relevant for the interpretation of the right to social services because it is likely that the drafters of the two documents understood and used the terminology in the same way. The *Service Delivery Model*, which was released in January 2006, is also discussed and its terminology will be critically examined and compared with the terminology used in the *White Paper*.

¹ *White Paper For Social Welfare*, Chapter 1, para 1.

² L Patel 'Challenges of Restructuring Social Welfare in Post Apartheid South Africa' in *The Social Work Practitioner* (15) 1 (2003), 1-11, 4.

2.2 Approaches to social welfare

A welfare system reflects the extent of a country's involvement in the social welfare of its people.³ Social welfare connotes the economic, social, political, mental, emotional and spiritual well-being and health of the people.⁴ Social well-being is characterised by the degree to which social problems are managed, the extent to which the needs of society are met, and the opportunities for advancement provided. Social problems exist in wealthy communities as well as in poor ones, but the question is: to what extent can people cope with the problems and to what extent does the State take responsibility for the welfare of its people?

Social well-being or social welfare is measured through indicators such as the unemployment rate, the infant mortality rate, the crime rate and literacy rate, for example. As explained earlier, the type of social welfare system that a State adopts determines what types of social services it will provide for the well-being of its people.⁵

The formal social welfare system developed as a response to social changes and the inability of the family and other informal systems to meet these needs. The social welfare system is dependent on social workers and other service providers, such as child and youth care workers. These professionals deliver a range of services under the welfare system. They are also concerned with the nature of the services delivered.⁶ Social workers and other social service professionals are at the forefront of service delivery because they are the ones that have direct contact with the clients and the beneficiaries of the services.⁷ Social services can include more than just services delivered by social workers, depending on its adopted definition.

The different models of social welfare discussed below are implemented through different approaches of service delivery with – mainly but not exclusively – social workers being at the forefront of services delivery. For example, under the residual model (see 2.1.1) social service approaches tend to be classified as philanthropic, while social services under the institutional model (see 2.2.2) are often referred to as administrative. During apartheid South Africa for example the service delivery was based on the 'social treatment model'. Community development and integrated family-centred and community-based services are service models which seek to implement the developmental approach to social welfare.⁸ It should be kept in mind that a variety of service approaches can co-exist alongside each other and can operate under various systems.⁹ Philanthropic or administrative services still have to be delivered under a developmental approach to social welfare and should run alongside and complementary to developmental services such as economic empowerment programmes for communities.

³W McKendrick 'The Future of Social Work in South Africa' (1990) 26 *Maatskaplike Werk/ Social Work* 10-18, 10.

⁴ A Lombard 'Developmental Social Welfare in South Africa: A Theoretical Framework' (1996) 32 *Social Work/ Maatskaplike Werk* 2 162-172, 163.

⁵ J Midgley 'A Definition of Social Development' in J Midgley (ed) *Social Development: The Developmental Perspective in Social Welfare* (1995) 12-36, 14.

⁶ AJ Bernstein 'Redefining Social Work's Emphasis on the 'Social': the Path to Development' (1995) 38 *International Social Work* 53-67, 54.

⁷ Ibid.

⁸ L Patel *Social Welfare and Social Development in South Africa* (2005) 156.

⁹ Lombard op cit note 4, 165.

2.2.1 The residual model of social welfare

The profession of social workers, and therefore the concept of organised, state-sponsored social services, originates from 18th century Europe. At that time there was a desire to systematise charitable activity, which was the only form of social welfare at the time. It was felt that charity should not just be handed out to everyone but that help should only be given to those people truly in need and with no other way of supporting themselves. Social work became recognised as a profession partly because it was believed that not everyone should receive charity. Social workers therefore began to investigate their clients' circumstances carefully to determine whether the clients were actually deserving of assistance.¹⁰

The residual model of social welfare is based on the belief that the community and the family must provide the care and support for the individual's social welfare. Services are provided as a privilege only to those people who qualify for them.¹¹ The residual approach works on the basis that limited public resources are targeted at the most needy sector of society. The State's involvement in people's welfare is therefore kept to an absolute minimum. This philosophy is well illustrated in a quote by a senior South African state official:

'The responsibility for every citizen's social security rests with the citizen himself. Only if his own efforts prove inadequate is the state prepared to step in with help and guidance. The independence of the individual, the family and the community must be maintained and encouraged. This principle is in keeping with the traditions of South Africa.'¹²

In terms of this model, social problems are seen as a result of individual failure or pathology. Under this model, it is generally accepted that social problems such as poverty, homelessness, ill-health, illiteracy and crime are caused by individual malfunctioning. Social services therefore have a social control function: individuals are seen to be responsible for the social problems that they find themselves in and social services are aimed at 'curing' such individuals.¹³

The limitations of this model are pretty obvious, especially in the context of a developing country. Most social problems are not the result of individual disobedience or malfunction, but are rather caused by larger structural, political and economic situations. South Africa is a perfect example. Apartheid South Africa systematically bound people to poverty through discriminatory laws and policies. The treatment of social problems associated with poverty can hardly be successful through counselling of the individual alone because the causes of poverty often lie with bigger, external forces. The residual approach therefore has limitations because it fails to address the causes of social problems.

2.2.2 The institutional model of social welfare

In contrast to the residual model of social welfare, the State is extensively involved in broader aspects of social welfare in terms of the institutional model. It targets a wider group of people, if not the whole of society.¹⁴ Different approaches to service delivery fall under this model and vary in terms of the services provided. The services

¹⁰ Midgley op cit note 5, 19.

¹¹ Bernstein op cit note 6, 54.

¹² Ibid.

¹³ Ibid.

¹⁴ Midgley op cit note 5, 21- 22.

delivered in terms of this model are termed 'the administrative services'.¹⁵ All approaches under the institutional model imply that the State takes a bigger role in providing welfare services to its citizens than it would under the residual model approaches.¹⁶

This model seeks to promote welfare by creating governmental social programmes that enhance the well-being of all the people through a variety of social services. Public education and health care for the working class are examples of the extensive services provided by the State. States with comprehensive programmes of this nature are called welfare states.¹⁷

The ideological difference between this model and the residual model is that individuals under the institutional model have the right to social welfare services.¹⁸ This is in contrast to the residual model of social welfare where services are seen as a charitable act. The difference between a right and a charity is that the rights-holder has actual claims against the State, whereas the receiver of charity does not. The receiver of charity must be grateful for what he or she received and has no claim to it if not provided.

The institutional model therefore is more progressive than the residual model because it accepts that people have a right to welfare and because it accepts that the State has a corresponding duty to provide this welfare. A much wider range of services are provided under this model and they cover a greater range of human needs such as housing, health care and education for example. This shift in ideology can be attributed to the changing political climates in the developing world after the Second World War and to the increase in demands on states by poorer members of society and the working class.¹⁹

While many developed countries in the second half of the twentieth century became welfare states and began providing social assistance, schooling and housing programmes to its citizens, similar movements occurred in the developing world. Colonial administrators began to introduce a very limited range of social services in the 1930s and '40s and these were extended by post-independence governments.²⁰ The social services provided by governments in the developing world were not as comprehensive as those in the developed world but still made significant improvements in terms of school attendance, literacy rates, and access to medical care, for example.²¹ In the 1980s however most governments in the developing world had to cut social expenditure due to massive debt and the imposition of structural adjustment policies.²² This resulted in social services delivery becoming unaffordable for many developing countries.²³

Confusion often arises when the institutional approach to social welfare is discussed in relation to South Africa because the term 'welfare' is not normally used in its broad sense. As 'welfare' is sometimes understood to refer to services delivered by the

¹⁵ Lombard op cit note 4, 166.

¹⁶ Personal communication, Lizette Berry, social worker and researcher in the Child Poverty Programme, Children's Institute, 17 February 2006.

¹⁷ Midgley op cit note 5, 22.

¹⁸ Bernstein op cit note 6, 54.

¹⁹ J Midgley 'Growth, Redistribution, and Welfare: Towards Social Investment' (1999) *Social Service Review* 3-21, 5.

²⁰ Midgley op cit note 5, 22.

²¹ Ibid.

²² Ibid.

²³ Ibid, 22

State's welfare department, there is a tendency to define the welfare system of a country according to what services are being provided by that department. In reality, however, an institutional model of social welfare requires extensive involvement of other departments such as housing and education. Officials under the apartheid system continuously stressed the fact that South Africa was not a welfare state, even though it did provide fairly comprehensive welfare programmes to the white population, such as free education and health care, low-cost housing, easy access to land and protected jobs. The services by the welfare department under apartheid were limited mainly to social security payments and residential accommodation for elderly white people.²⁴ It could therefore be argued that, for the white population of South Africa, an institutional model of social welfare was in place.

The institutional model combines a number of approaches, including those that exist in terms of the residual model. It also draws on professionals other than just social workers, for example teachers and medical staff.²⁵ A meaningful debate about the institutional model of social welfare would have to discuss the broader sphere of economic life and would have to include the activities of a variety of other departments. In South Africa, the needs are so pressing and diverse that a full implementation of an institutional welfare model is unthinkable, even 10 years after democracy. Countries like South Africa need a welfare system that can provide the wide range of services of the institutional model but which at the same time can operate with limited public funds.

The institutional model is more comprehensive than the residual model but the two share some criticisms against their approaches. In the first place, both models have been criticised because they maintain the socio-economic and political *status quo* of a country. The aim of social services is to enable the individual to regain and maintain an effective level of social functioning. While this seems like a good cause, the *status quo* sometimes needs to be changed to improve the social welfare of citizens in reality. Again apartheid South Africa is a good example in this regard. Neither the residual nor the institutional models are effective in addressing the inequitable distribution of power because neither of these models addresses the causes of poverty. Both models only deal with the subsequent consequences of poverty but this will not effectively alleviate the problem; it will only address some of its manifestations.

Another disadvantage of both models is the fact that the term 'welfare' has negative connotations originating from the residual model of welfare.²⁶ In the United States, for example, 'welfare' has almost become a term of abuse. Women who obtain welfare are teased as 'welfare mothers' and are often accused of being lazy and not wanting to work.²⁷ Even though the term 'welfare' is meant to connote a state of social well-being and prosperity, those who receive it are still likely to suffer some form of social exclusion.²⁸ In order for institutional-type state support to be regarded as a normal entitlement, there has to be a clear commitment to the institutional model. The problem that causes the associated stigma is that the term 'welfare' is confused with cash grants, thereby masking the receivers of welfare services as people receiving money for nothing.

²⁴ Personal communication, J Loffel, 8 May 2006 [unpublished on file with the Children's Institute].

²⁵ Lombard op cit note 4, 165.

²⁶ Ibid, 163.

²⁷ Midgley op cit note 5, 13.

²⁸ Ibid, 13

Perhaps the greatest weakness of both models is that they rely solely on the national budget and contributions from private resources for funding. Neither of these welfare models includes economic development as part of the agenda. These models are funded through taxes and private donors while efforts to enhance the economic functioning of the individual and community are not directly included. The dependence on outside funding of these models is problematic because the need for social services is likely to increase if the economy weakens, if more people are unemployed or if private funding becomes scarce. In other words, the need for social services is likely to be greater when the resources to fund the system decrease.²⁹

This is the main criticism against a redistributive welfare system, and it is argued that it hampers economic growth. The beneficiaries of welfare provisions do not directly contribute to the economic development of the country, while at the same time they are dependent on economic development to pay for the benefits they receive. In countries with extensive welfare systems like Britain and Germany, it has been argued that the welfare system has created a huge class of dependent people who rely on a small number of contributors for their livelihood.³⁰ It is also argued that beneficiaries are not encouraged to work and that this creates increased labour costs and reduced labour flexibility.³¹ Another problem with both models is that beneficiaries are vulnerable to being stigmatised and may continue to suffer social exclusion.

2.2.3 *The developmental approach to social welfare*

The above criticisms inspired the development of a new concept called the 'developmental approach to social welfare'. This concept is distinct from the approaches set out above because it seeks to combine the social development of citizens with economic development of the State. It has been argued that the focus on remedial interventions by social work is not ideal and that the profession should rather engage in preventative activities. Community-based social work practitioners have argued for a long time that mobilising and organising people to improve their own social conditions is much more effective than remedial approaches. The social development approach formulates the conception of social policy as productivist and investment-oriented, unlike the redistributive and consumption-orientated policy of the two models discussed previously. The models of social welfare still apply but the developmental approach to social welfare includes new concepts of redistribution as social investment that generates positive returns and continuously feeds resources back into the economy.³²

International events like the 1995 World Summit on Social Development held in Copenhagen³³ popularised the need for commitment to social development.³⁴ These events will be dealt with in more detail later in this paper. International agencies such as the United Nations (UN) encouraged the adoption of developmental social welfare policies in developing countries. Social workers in countries such as the United States argued that this model would also be appropriate

²⁹ *Ibid*, 24

³⁰ Midgley *op cit* note 19, 7.

³¹ *Ibid*, 5.

³² *Ibid*, 9.

³³ World Summit Declaration on Social Development, Copenhagen, 1995, <<http://www.un.org/esa/socdev/wssd>>

³⁴ J Midgley 'Involving Social Work in Economic Development' (1996) 39 *International Social Work* 13-25, 15.

to address the needs of the people they serve. It has, however, not been widely adopted in developed countries.

In developmental studies the term 'social development' has been used to classify social services provided in developing countries. Social work services were increased through programmes that made positive contributions to economic development, such as mass literacy and community development programmes. The UN eventually questioned this definition of social development and used the term to refer to the general improvement of a standard of living. In developing countries, the term 'social development' can therefore refer to services rendered by a department of social development and other sectors of Government. It can also be the umbrella term for all the major social service programmes.³⁵

Social development is now defined as 'a process of planned social change designed to promote the well-being of the population as a whole in conjunction with a dynamic process of economic development'.³⁶ Supporters of this model argue that social workers can use established forms of social work to create and support programmes designed to encourage economic development in a number of different ways. Services that involve ordinary people in their own development can be introduced. Basically, social services under this model are designed to ensure that ordinary people derive positive benefits from economic growth.³⁷

A number of authors have suggested different ways of implementing a developmental social welfare model.³⁸ A few examples will be given here. Some suggested that social work can contribute to economic development indirectly by removing factors that impede economic growth.³⁹ For example, social workers can remove obstacles to economic development by promoting family planning. Social services can also be involved in economic development through social planning and by influencing social policy and programmes that foster economic growth.⁴⁰

Essentially, the definition of social development stresses the role of social services in addressing problems of poverty and deprivation. This, in itself, contributes to social development because needy people no longer depend on public resources; they engage in productive activities, which enhance their income – their social development – and contribute to the development of the community.

Midgley points out that the mobilisation of human capital is one way for social development and economic development to occur simultaneously.⁴¹ Investments in education, nutrition and health care produce net economic gains, while at the same time contributing to the social development of the individual.⁴² Services such as day-care centres promote economic development because they free up parents' time to engage in money-generating activities, while at the same time improving the nutrition, health and education of the child and thereby promoting their active participation in

³⁵ Midgley op cit note 5, 34.

³⁶ Midgley op cit note 5, 25.

³⁷ Midgley op cit note 19, 16.

³⁸ Midgley op cit note 19, 11-14; McKendrick op cit note 3; J Midgley 'Strategies for Social Development' in J Midgley (ed) *Social Development: The Developmental Perspective in Social Welfare* (1995) 102-137, 115; Patel op cit note 2, 7.

³⁹ Midgley op cit note 34, 23-24.

⁴⁰ Ibid.

⁴¹ Ibid, 20.

⁴² Ibid.

economic activities later in life. Similarly, investments aimed at women have shown net economic gains, while at the same time contributing to development.⁴³

The idea of promoting economic independence and self-reliance sounds a bit peculiar in relation to children because children do not participate directly in the economy – or at least they are not supposed to. Developmental social welfare in relation to the welfare of the child should focus on the investment in human capital such as health, nutrition and education because these have been proven to increase economic growth.⁴⁴ It also means that conventional high-cost remedial child welfare services must be supplemented with more cost-efficient preventative models of child welfare. Community day-care centres, such as those that have been successfully implemented in some parts of Asia, are examples of preventative social services.⁴⁵ Such services not only promote the welfare of the child and allow the parents or caretakers to engage in economic activities, but also prevent the neglect and abuse of the child.⁴⁶

Developmental social welfare also has implications for other vulnerable members of society, such as people with disabilities. Human capital investments attempting to provide for people with disabilities have taken the form of skills training in vocational and related subjects.⁴⁷

Social development policies also promote investments in social capital. It has been scientifically proven that enhanced community integration can promote local economic development.⁴⁸ This involves creating a climate that is conducive to social development within the community. Indicators of distorted development such as crime, drug abuse, violence and the abuse of women and children are major threats to economic growth in the long term. Services addressing these social ills fall under the developmental approach to social welfare because, in the long run, dealing with these problems makes economical sense.⁴⁹

The developmental model has many similarities with the institutional model in terms of the extent of involvement of the State. It is, however, more proactive in that social welfare becomes a primary means of creating social equality. Its emphasis lies in the egalitarian concept of social justice. Social problems are seen to be the consequence of the unequal distribution of power and resources in society. Social services in terms of this model are concerned with structural changes that need to take place to address such inequality.⁵⁰ Social service professionals use empowerment and advocacy strategies to promote the clients' control and involvement in all aspects of their lives. Empowerment strategies are aimed at reducing or overcoming negative attitudes to the less-privileged by more privileged groups in society. In essence, social equality lies at the heart of this model.⁵¹

The different approaches to social welfare have common features: they all promote welfare; they all use interventions in the form of services; and these interventions are

⁴³ Ibid, 21.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Midgley op cit note 19, 11.

⁴⁷ Ibid, 11.

⁴⁸ Ibid.

⁴⁹ Ibid, 15.

⁵⁰ Bernstein op cit note 6, 54.

⁵¹ Ibid, 55.

not controlled by market forces.⁵² The social development approach is, however, the only approach which attempts to address economic and social development at the same time. It has been argued that the residual and the institutional approaches should incorporate a developmental focus.

The reliance on remedial rather than developmental interventions has been severely criticised, especially in developing countries where there is an overriding need for economic growth. Many countries suffer from 'distorted development', which means that economic development is not paralleled with social development – the benefits of economic growth are not shared equally and fairly amongst the population.⁵³ Poverty is a direct consequence of distorted development. It is characterised by declining economic growth, unemployment and lack of access to land and social services. These are indicators of depressed welfare.⁵⁴ The developmental approach to social welfare is the only approach that addresses distorted development because it addresses economic and social development at the same time.

The developmental approach to social welfare can also be viewed as an extension of the institutional versus the residual model debate. As neither the institutional nor the residual model addresses economic development, the social developmental approach can be seen as a third welfare model.⁵⁵ The social development approach does not, however, negate the other approaches or minimise their benefits to people. The crucial difference is that none of the other approaches attempts to harmonise social and economic policies. The fact that these policies are linked in this approach it means that the developmental model to social welfare can transcend other welfare models.⁵⁶

The institutional approach may, for example, be seen as a strategic approach to combine the different social development strategies. Social development strategies are not mutually exclusive, but they can be integrated and they can complement each other. And, as was pointed out earlier, even if the overriding problem is distorted development and poverty, the need for interventions other than those that are developmental in nature still exists. For example, even if there are community development and job creation strategies in place, the need for child protection services and other interventions not directly related to economic growth are still required.

On the other hand it must also be noted that services that would not normally be classified as developmental in nature may have far-reaching, positive spin-offs for a country's economy. For example, free schooling is provided in terms of the institutional model but the long-term benefits of such programmes are economic as well. The same can be said for comprehensive child protection services. A problem in South Africa is the over-emphasis in theory on the developmental approach to social welfare, thereby crowding out other non-developmental services such as the formal child protection services. Those kinds of services are often under-funded because of the misconception that the work of the Department of Social Development is to address poverty – which it does through social security grants – to the detriment to

⁵² Midgley op cit note 5, 25.

⁵³ J Midgley 'Introduction' in J Midgley (ed) *Social Development: The Developmental Perspective in Social Welfare* (1995)1 - 11, 1.

⁵⁴ P Rankin 'Developmental Social Welfare: Challenges Facing South Africa' (1997) 33 *Journal for Social Work* 184-192, 186.

⁵⁵ Midgley, op cit note 5, 25.

⁵⁶ Lombard, op cit note 4, 165

social service delivery. It is therefore important to conceptualise the welfare model as encapsulating approaches from both the institutional and the developmental model.

2.3 Social welfare under apartheid

Both colonialism and apartheid shaped the nature, form and content of the social welfare policy in South Africa. The indigenous people of South Africa were accustomed to traditional forms of social support such as communalism, cooperation and mutual support to each other. But these were severely disrupted by the colonial and apartheid political dispensations, with African customs rich in social organisation and *ubuntu* were treated as inferior. Colonial rulers such as the Dutch and British considered themselves to be racially and socially superior. This attitude manifested in the ideology of apartheid, which was adopted as government policy in 1948.⁵⁷

The discovery of minerals, the mining industry and generally the way in which industrialisation occurred in South Africa laid the foundation for racial differentiation and racial capitalism in social welfare – and as such the systematic impoverishment of black people. The mining industry recruited large numbers of black workers. These workers lived under appalling conditions in the developing cities. Peasants and subsistence farmers were forced into wage labour, leaving their impoverished families – mainly women, children and the elderly – behind in the rural areas.⁵⁸

The residual system of social welfare that was maintained during apartheid⁵⁹ limited resources in the most-needy sectors of society.⁶⁰ Personal welfare was considered to be the responsibility of the individual, the family or the community where that person lived. The State intervenes with 'help' and 'guidance' only if the efforts of the individual or the community were inadequate.⁶¹

Communities and families were, however, systematically destroyed by the apartheid system.⁶² Their ability to absorb social shocks was therefore extremely limited. While the mining industry recruited men from the rural areas, the 'pass law' system did not allow the families of such labourers into the cities. Many women and children were left to live in desperate poverty in the rural areas or in the so-called 'homelands'.⁶³ Over two million people were relocated during apartheid in terms of the policy of 'separate development'.⁶⁴ These relocations split functioning communities and moved them to other areas in the country.⁶⁵ Many social problems such as alcohol and drug abuse, communication and relationship breakdowns, marital conflicts and break-ups, parenting difficulties and family violence can be traced back to the hardship families and communities had to face.⁶⁶

⁵⁷ Patel op cit note 2, 1.

⁵⁸ Ibid, 2.

⁵⁹ McKendrick op cit note 3, 10; L Patel & C de Beer *Transforming Health and Welfare Services* (1990) 4; Bernstein op cit note 6, 56.

⁶⁰ Midgley op cit note 53, 1.

⁶¹ McKendrick op cit note 3, 11.

⁶² See the *White Paper for Social Welfare* (8 August 1997) para 12, <http://www.polity.org.za/govdocs/white_papers/social971.html>.

⁶³ Patel op cit note 2, 2.

⁶⁴ N Haysom 'Population Relocation and The Law/ Social Engineering on a Vast Scale (1984), 2nd *Carnegie Inquiry*, 6.

⁶⁵ N Haysom 'Negotiating Political Settlement in South Africa' (2002) 11 *Track Two* 8-45.

⁶⁶ J Loffell *The Right to Social Security and the Right to Family Life* (1995). Submission made to the Constitutional Assembly [unpublished copy on file with the Children's Institute].

Families' difficulties can therefore be traced back to the oppressive and unsupportive environments that apartheid policies created.

Families faced increasing economic stress and, by the time the apartheid system was dismantled, statistics illustrated the devastating effect that its policies had on the country's economic and social development. It was estimated that in 1995, 61% of the African population were poor, whereas only 1% of the white population were poor. The economic stress experienced by the black population also relates to their systematic economic disempowerment. Poor single-parent families, which are usually female-headed, were worst affected. Poverty, combined with environmental stress and a sense of powerlessness and frustration, contributed to the break-up of family structures, which is one of the major causes of social problems.⁶⁷

The racially fragmented system was totally ill-equipped to assist people to cope with their social problems. Like all government departments, the Department of Social Welfare and the Department of Health were racially segmented and comprised 12 different racial welfare sub-systems.⁶⁸ The welfare system provided extensive social services for white people and was modelled on the welfare policies developed in the Commonwealth countries. The welfare system for black people was residual or virtually non-existent.⁶⁹ The resources were allocated according to apartheid policies so that white people, who comprised less than 20% of the population, received more than four times more state resources than black people, who made up 70% of the population.⁷⁰

The apartheid government also relied heavily on voluntary initiatives to provide the services that the State would normally have had to provide. Joint responsibility between the Church, State and private initiatives were emphasised. The State provided financial support to voluntary welfare organisations that were expected to deliver and co-ordinate services and to raise the professional standards of service delivery.⁷¹

Some believed the government also attempted to control the political activities of social workers that were anti-apartheid activists through legislation such as the Social and Associated Workers Act⁷² for example. This Act prescribed the syllabus for a degree in social work and thereby maintained the focus on welfare models developed in Europe and North America. Social work students in terms of this Act were also required to register annually with the Social Work Council, which controlled many aspects of the profession.⁷³ Circular 66 of 1966 was issued by the Department of Social Welfare and required welfare organisations to implement apartheid policies in the welfare field. This included enforcing the legislation which separated the different race groups in terms of amenities; the creation of separate services for the different race groups and separate boards of management of welfare organisations.⁷⁴

These apartheid policies had a very profound impact on welfare organisations and negatively affected the work that they did. For example, the adoption of children could not be concluded if the race classification of the parents was not known.

⁶⁷ Ibid.

⁶⁸ McKendrick op cit note 3, 11.

⁶⁹ Patel op cit note 2, 3.

⁷⁰ Ibid, 2.

⁷¹ Patel op cit note 8, 69.

⁷² Act 110 of 1978.

⁷³ Bernstein op cit note 6, 57.

⁷⁴ Patel op cit note 8, 73.

This caused many children to stay in institutions. Some organisations resisted these developments but the majority complied.⁷⁵

The reliance on the voluntary sector to provide the bulk of social services was problematic because the poorest areas had the least capacity for voluntary services. The government often provided only a token service to such areas. Since poverty was (and still is to a large extent) directly related to race, in practice it meant that there were very few or no services for people who were not white. The continued and heavy reliance on the voluntary and private sectors to provide a variety of social services today still a major cause of concern. At the same time there is no proper plan in place to ensure a network of services that cover the whole country, including the rural areas where the need for social services is just as great as in urban areas, if not greater.

The social services that were provided under apartheid conformed to the residual model and therefore relied heavily on the case work approach. It was estimated that 90% of social work organisations provided services that were therapeutic in nature. They mainly dealt with people's personal problems. Within the relatively controlled apartheid environment, the causes of problems could not be addressed without taking a direct opposition to the government. In terms of residual welfare, a high standard of alternative care facilities existed for children who for example were so much at risk that they had to be temporarily removed from their parental families. The welfare system and the control exercised by the government meant that social workers could not directly attack the wider circumstances which caused the breakdown or disruption of families in the first place. Services aimed specifically at strengthening family life and avoiding the institutionalisation of children did exist but unfortunately these were directed mainly at the white population. These services could not be given to black families since that would put the social worker in direct conflict with the apartheid regime.⁷⁶

Consequently, most of the therapeutic interventions were unsuccessful because 'you cannot case work people out of poverty'.⁷⁷ The volume of social problems also continued to grow because wider causal factors remained largely unaddressed and, in fact, grew in severity in some cases.⁷⁸ Social workers became depressed and demotivated because even their most-energetic efforts seemed to have little or no impact on the problems they were trying to resolve.⁷⁹

What this ultimately meant was that black people, who had the greatest need for social services, received minimal services. When they did receive social services, the services did not respond to the problems they were facing, nor were they appropriate for the circumstances the people found themselves in since the problems were often caused by oppressive and racist apartheid laws. Furthermore, the social work profession in South Africa was modelled on those from developed countries and was not designed to address problems specific to the situation in South Africa.⁸⁰

⁷⁵ Ibid, 75. It should be noted here that this illustration is by no means meant to identify social workers and associated workers as a professional group that failed to resist the apartheid realities. Many social workers and associated professionals paid a high price for their direct involvement in the liberation struggle. It is also important to point out that people in most other professions such as doctors, lawyers, teachers, nurses and business people also did not tackle the apartheid system directly.

⁷⁶ McKendrick op cit note 3, 12.

⁷⁷ Ibid, 12.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid, 13.

This does not mean, however, that the mainstream social work services of the time were useless – as is unfortunately often implied. Services like child care, protection and counselling in their various forms were needed then as they are still needed today.

This refers back to the point made earlier that the various approaches should run alongside each other as each has invaluable and significant contributions to make to the welfare of the country. In the context of today's South Africa it would be important to apply and develop these services to overcome the racial discrimination that was inherited from the apartheid system.⁸¹

2.4 Social work in post-apartheid South Africa

Even though the voluntary sector could not fulfil the service needs of the population, the partnership between the government and the voluntary welfare sector has been a strength in the history of the South African welfare system. A tradition of organisations aligned with the anti-apartheid movement is said to have existed⁸² and a significant number of organisations in the mainstream welfare sector participated in the move towards the democratic social welfare order. In this process these organisations began to experiment with community-based support and care strategies, advocacy and human capacity-building through education and economic empowerment interventions.⁸³ They developed alternative models, which later shaped social policy. Their work focused on a people-centred developmental approach to social welfare. In that context, they advocated for redistributive social policies, a mixed economy of social welfare, partnerships between the State and the voluntary sector and a leading, proactive role for the State as a facilitator of development.⁸⁴

The main problem faced by the visionaries of a new welfare system in South Africa was the fact that the sector was completely fragmented.⁸⁵ The apartheid government had created no less than 10 'homeland' departments of welfare and four central government departments. Amongst these departments, service delivery and resource allocations were segregated according to race. This fragmented system needed to be replaced by a unitary system.⁸⁶

In the mid-1990s, stakeholders embarked on a two-year consultative process with the aim of building a new national consensus for social welfare. The process was extremely complex and involved the mediation of different sentiments and philosophies on social welfare.⁸⁷ Political activists, religious organisations, community leaders and social workers contributed to this process of drafting a new welfare policy.⁸⁸ It became clear during these proceedings that the welfare sector would not receive any additional funding due to financial constraints, which made consensus-building more difficult because of competing interests and ideological differences.⁸⁹

⁸¹ Loffell op cit note 24.

⁸² Patel op cit note 2, 2.

⁸³ Ibid.

⁸⁴ Ibid, 3.

⁸⁵ Patel op cit note 2, 2.

⁸⁶ Ibid.

⁸⁷ Ibid, 4.

⁸⁸ M Brown & RJ Neku 'A Historical Review of the South African Social Welfare System and Social Work Practitioners' View on its Current Status' (2005) 48 *International Social Work* 301-312, 304.

⁸⁹ Ibid.

Despite these differences, consensus was finally reached and the *White Paper for Social Welfare* was finalised in 1997.

2.4.1 *The White Paper for Social Welfare*

South Africa held its first democratic elections in 1994. This event marked the end of apartheid and the beginning of the new democratic dispensation. One of the goals of the new government was to develop social welfare policies that ensured basic welfare rights for all citizens. The new policies were meant to prioritise the needs of previously disadvantaged people who have suffered oppression and discrimination.⁹⁰

The preamble of the *White Paper* states that the goal of developmental social welfare is a humane, peaceful, just and caring society which will uphold welfare rights and will facilitate the meeting of basic human needs.⁹¹ It states that the welfare system is to devise strategies which address the alienation and the economic and social marginalisation of those who are living in poverty, those who are vulnerable and those who have special needs.⁹² Furthermore, existing services such as the curative services under the remedial model should be reoriented towards developmental approaches.⁹³

The *White Paper* recognises that poverty is a huge problem in South Africa and that multi-sectoral responses are needed to address poverty and associated problems.⁹⁴ The commitment to a developmental approach to social welfare is clearly set out in the *White Paper* as it states that:

[s]ocial and economic development are two interdependent and mutually reinforcing processes. Equitable social development is the foundation of economic prosperity and economic growth is necessary for social development. Social welfare refers to an integrated and comprehensive system of social services, facilities and programmes [...] to promote the social functioning of people.'

The *White Paper* recognises that the social welfare system is inextricably linked to social services delivery. In terms of terminology the *White Paper* states that 'social welfare' refers to an integrated and comprehensive system of 'social services', facilities, programmes and social security aimed to promote 'social development', social justice and social functioning. Social security, 'social services' and related 'social development programmes' are, according to the *White Paper*, investments that will lead to economic growth.⁹⁵ In terms of restructuring, the *White Paper* states that one priority is to rationalise the 'social welfare delivery system' to include 'social development', 'social welfare services' and social security programmes. It states in chapter 2 that 'social welfare services' are part of a range of mechanisms to achieve 'social development' such as 'health, nutrition, education, housing, employment, and land reform'. The *White Paper* therefore seems to use the term 'social welfare' as the overarching term which covers social services, social security and other programmatic interventions which, for the sake of clarity, will be referred to as welfare programmes.⁹⁶ The term 'social welfare services' seems to be used synonymously with 'social services', thus running alongside other welfare programmes such as

⁹⁰ Ibid, 304.

⁹¹ *White Paper* para 1.

⁹² Ibid 2.

⁹³ Ibid 5.

⁹⁴ Ibid 3.

⁹⁵ Chapter 1, para 8.

⁹⁶ Chapter 2, para 5.

housing, health and education. Collectively these interventions are aimed at achieving social development.

This paper is concerned with social services specifically and not welfare programmes as defined in the previous paragraph. The social services that the *White Paper* provides for are aimed at those living in poverty, those who are vulnerable and those who have special needs. The services should be rehabilitative, preventative, developmental and protective.⁹⁷ The stated aim of the *White Paper* is also to give effect to those UN Conventions that are pertinent to developmental welfare.⁹⁸ These will be discussed in more detail in Chapter 4.

The *White Paper* basically declares a 'war on poverty'. Poverty is often accompanied by additional social problems such as family disintegration, crime and substance abuse.⁹⁹ Appropriate programmes will therefore be implemented to enhance social integration. Support and assistance will be provided to individuals and families to help them break out of the structural barriers that keep them in poverty.¹⁰⁰

The *White Paper* is a policy document for the Department of Social Development alone and not for the whole of government. The war on poverty needs to be tackled in a joint effort by all the departments. The focus on 'poverty' as the core business of the Department of Social Development is arguably problematic because the main poverty alleviation programme in that department is focused on social security grants, which take up to 90% of its budget. In trying to define all the responsibilities of the department in solely fighting a war on poverty, social services or social welfare services as they are called have been sidelined. Issues such as child maltreatment, family breakdown, orphanhood, etc., are poverty related but are not regarded as 'poverty' as such and have therefore been neglected by the department.

At this point it must also be noted that, when the *White Paper* was drafted, the new democratic government also adopted the Reconstruction and Development Programme, commonly referred to as the RDP. The policy objectives of the RDP were the provision of basic needs, developing human resources, building the economy and democratising the State and society. The RDP also advocated the idea of developmental social welfare. The *White Paper* should therefore be read with the RDP in mind because the RDP required every government department to develop transformation policies and plans that were to be funded through the RDP fund. Arguably this was a method through which the 'war on poverty' identified in the *White Paper* could be co-ordinated across different government departments. Unfortunately competition between the RDP offices and the different ministries and departments, as well as waning public confidence that the exceptionally high targets set by the departments would be met, eventually resulted in the closure of the RDP offices.

The closure of these offices coincided with the adoption of the government's *Growth, Employment and Redistribution Policy* (GEAR) in 1996. Even though GEAR was well received by the private sector, critics argued that GEAR was a shift from government's commitments to its social goals due to pressure from big businesses and as a result of economic globalisation. It was perceived as shifting Government's responsibility for social welfare to the individual, families and the private sector and is blamed for the abrogation of state responsibility for meeting basic needs.¹⁰¹

⁹⁷ Ibid, para 7(a).

⁹⁸ Ibid, para 7(d).

⁹⁹ Ibid, 27(c).

¹⁰⁰ Ibid.

¹⁰¹ Patels op cit note 8, 95.

This is one explanation why the 'war on poverty' envisaged in the *White Paper* ended up being perceived as the business of the Department of Social Development alone.

The *White Paper* is none the less still very important in providing insight into what services are implied by children's right to social services in the Constitution. Chapter 8 of the *White Paper* practically describes how social integration is to be enhanced. The focus here is again on strengthening the family, which ideally seeks to care for, nurture and socialise its members, including children. The needs of vulnerable people or those with special needs shall be addressed through the family life-cycle approach. The *White Paper* suggests that the needs of children who do not have a family must be prioritised.¹⁰² The life-cycle approach must address the needs of people at different stages. These stages are the early childhood and childhood development phase; the school-going and adolescent years; the launching of young adults; middle age; and retirement and old age.¹⁰³ The focus of social welfare interventions should be family-centred and incorporate developmental interventions. A better balance between rehabilitative, protective and developmental interventions should be achieved.¹⁰⁴ Under the apartheid regime, the emphasis was on curative services and specialist therapeutic services for defined target groups. These should still be in place for defined target groups and to meet certain needs.¹⁰⁵ However, they now need to be supplemented with preventative and developmental welfare services.

The *White Paper* deals specifically with the family and the life-cycle approach. It will be recalled that the developmental approach to social services is aimed at achieving the independence and self-reliance of people. For services delivered to children there is an obvious paradox in terms of this approach because children are inherently dependent on their families. The developmental approach to social welfare as encompassed in the *White Paper* gives the highest priority to the promotion of family life.¹⁰⁶ The aim of family and child welfare services is to preserve and strengthen families so that they can provide a suitable environment for the physical, emotional and social development of all their members. Programmes that strengthen families and assist in reconciling family and work responsibilities should be devised. Efforts must be put in place to transform family relationships because the current structure of families contributes to the subordination of women and children.¹⁰⁷ A range of social services should be made available to families in need. Special attention must be given to families who are vulnerable and at risk and who are poor and involved in child-rearing and caring for their members at unacceptable social cost to themselves.¹⁰⁸ The *White Paper* identifies families in special need of support as those families that have children, especially children under the age of five, single-parent families, and those families caring for persons with disabilities and chronic illnesses.¹⁰⁹

Guidelines and strategies in the *White Paper* recommend that family support programmes should address the fundamental causes of family disintegration.¹¹⁰ Efforts should be made to ensure that families and children have equal access to appropriate social welfare services. This will promote social competence in the

¹⁰² Chapter 8, para 5.

¹⁰³ *Ibid*, para 6.

¹⁰⁴ *Ibid*, para 8.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*, para 41.

¹⁰⁷ *Ibid*, para 42.

¹⁰⁸ *Ibid*, para 43.

¹⁰⁹ *Ibid*, para 43.

¹¹⁰ *Ibid*, para 44(b).

different stages of the life cycle.¹¹¹ Interventions should concentrate first on prevention by enhancing family functioning, then on protection, and lastly on the provision of statutory services.¹¹²

Children in difficult circumstances are identified to be those whose human rights are violated and denied and whose growth and development are subsequently impaired.¹¹³ Pre-school children are defined as those in need of early childhood development services, especially children coming from disadvantaged communities. The severe lack of services for children with disabilities is recognised. The lack of acceptable minimum standards for the provision of such services to pre-school children negatively affects the quality of care that these children receive.¹¹⁴

The *White Paper* also acknowledges that out-of-home care has increased. Children are increasingly being abandoned by their families and adoption as a cost-effective means of permanency planning is under-utilised. Again, not having a minimum standard for such services makes the system ineffective in meeting the needs of the increasing number of abandoned children.¹¹⁵

Children with disabilities are denied opportunities such as access to education, recreation and public transport. The *White Paper* recognises that many disabilities are the result of poverty, preventable diseases, substance abuse, and injuries due to violence.¹¹⁶ Facilities for early detection, diagnosis, treatment and support are inadequate. This leads to and increases both the extent and the severity of the disablement. Families caring for children with disabilities have inadequate access to support facilities and services that assist them to keep their children in the family environment for as long as possible. A shortage of day-care facilities for these children and information on services and care strategies for children with disabilities is recognised in the *White Paper*.¹¹⁷

Child abuse and neglect is recognised as a growing problem. Existing services are fragmented and under-resourced and, in some areas, there are no services at all. Services vary greatly in quality because of a complete lack of policy and management protocols. The *White Paper* therefore calls for a comprehensive and coordinated prevention strategy to deal with child abuse.¹¹⁸

2.4.2 The Service Delivery Model

The *Service Delivery Model* was developed because the Department of Social Development placed too much emphasis on the payment of grants, which crowded out budgets for the delivery of social services. The *Service Delivery Model* highlights the roles of Government, civil society and organisations in the delivery of social services. Following the developmental approach advocated in the *White Paper for Social Welfare*, the *Service Delivery Model* seeks to provide clarity on the services that are to be delivered through the developmental approach to social welfare.¹¹⁹

¹¹¹ Ibid, para 44(f).

¹¹² Ibid, 44(g).

¹¹³ Ibid, 18.

¹¹⁴ Ibid, para 19-21.

¹¹⁵ Ibid, para 22.

¹¹⁶ Ibid, para 23-25.

¹¹⁷ Ibid, 26.

¹¹⁸ Ibid, 29-31.

¹¹⁹ Speech by Dr Jean Benjamin, Deputy Minister of Social Development: Launch of the Integrated Services Delivery Model. Cape Town, 28 November 2005, <<http://www.welfare.gov.za/media/2005/nov/shelt1.htm>>.

The stated aim of the *Service Delivery Model* is that it seeks to provide clarity on the nature, scope and level of services in the developmental social services sector, excluding social security.¹²⁰ The *Model* is one of a series of documents that seek the implementation of the values and principles captured in the *White Paper*.¹²¹

The *Model* identifies the main functions of the Department of Social Development as focusing on social security, 'social welfare services' and 'community development'. These three interventions are to run parallel to each other. In other words, a person who receives social security grants should also benefit from social welfare services and community development.¹²² The overall term to describe these interventions suggested in the *Service Delivery Model*, other than social security, is 'developmental social services'.¹²³ The *Model* does not clarify the terminology related to these issues.

It is possible but unlikely that the *Model*, like the *White Paper*, uses the term 'social services' synonymously to the term 'social welfare services'. In the key concepts of the *Model* the term 'social services' is specifically said to mean a 'broad comprehensive range of services relating to social welfare and community development services provided in a continuum to ensure the integration and sustainability of invention efforts'.¹²⁴

The more likely interpretation is that the term 'social services' refers to the broader, overall concept, and 'social welfare services' refers to the more specific service provision. This is most likely the case as the term 'social welfare' in the *Model* is said to cover a range of 'services and programmes' directed at addressing the causes and consequences of poverty and vulnerability.¹²⁵ This is how many professionals use the terms.¹²⁶ Unfortunately the definition of 'social services' in the *Model* does not help to untangle the confusion around the terms set out earlier, especially since the right to 'social services' of children is unlikely to refer to a broad overarching right that covers everything from developmental social welfare to community development. The *Model* therefore also doesn't assist in establishing a definition of the right of children to 'social services'. In the absence of a clear definition, the *Model* does not further the debate and will therefore not be discussed in more detail in this paper.

2.5 Conclusion

In this chapter, the roots of social services and social services provision and the history of the social welfare provisions in South Africa were set out. The chapter described the difference of approach that was taken by the welfare sector in the 'old' and the 'new' South Africa. The residual model under which South Africa operated in the past did not address the country's historical and economic needs. Instead, it was a tool to suppress social revolution and to maintain the *status quo* of a country riddled with inequalities and poverty.

The old approach, which focused on social service interventions designed in the developed world, provided remedial interventions rather than addressing the causes of the problems. In terms of social services for children, it meant that large amounts of tax payers' money were spent on building and maintaining expensive institutional

¹²⁰ *Service Delivery Model* (2006) 10.

¹²¹ *Ibid*, 10

¹²² *Ibid*, 12.

¹²³ *Ibid*, 6.

¹²⁴ *Ibid*, 20.

¹²⁵ *Ibid*, 22.

¹²⁶ Loffell op cit note 24.

care facilities for children who were removed from the family environment. The causes of family breakdowns were not addressed.

With the change to a democratic South Africa, stakeholders in the welfare sector aligned themselves with global trends. They developed a policy that was radically different from the one in the past. This policy was the *White Paper for Social Welfare* and it incorporates the developmental approach to social welfare. Broadly speaking, this approach attempts to combine social and economic development. In relation to children, this means creating a more cost-effective, preventative role for social services. Problems should be prevented by strengthening and empowering the community and family structures, thereby protecting the children. This function was to be incorporated in the more specialist services from the past in such a way that they complement each other. When comparing the terminology used in the *White Paper* with those used in the new *Service Delivery Model*, it transpires that the *Model* does not make the search for unanimously agreed and defined terminology any easier since it does not define the terms clearly; nor does it use them consistently.

The next chapter deals with international law. The right to social services does not appear in international law in the same manner as described above. An analysis of the relevant treaties will however reveal that the services mandated and recommended by the treaties, and the corresponding commentary, incorporate the developmental model described earlier.

By prescribing a range of socio-economic rights aimed at progressively and continuously improving people's living standards, the international treaties that South Africa acceded to oblige the State to take an active role in the social welfare of its people. The overall social welfare system therefore has to move away from the residual model. The services prescribed for children specifically emphasise that preventative and protective measures must be taken to strengthen the family and other social structures that provide care and protection for children.

The next chapter will show that developments in social welfare circles are in line with South Africa's international law obligations, which (according to section 39 of the Constitution) must be taken into consideration when the right to social services is being interpreted.

Chapter 3: Social services in international law

3.1 The importance of international law

The Constitution states in section 39 that:

'When interpreting the Bill of Rights, a court [...] must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.'

International law is therefore extremely important when interpreting any provision in the Bill of Rights. The influence of international law will vary depending on the status of the treaty in South Africa. Naturally, binding international law, such as the UNCRC and the ACRWC, will carry more weight than non-binding international law.¹ Both, however, must be considered.²

Both the UNCRC and the ACRWC have been signed and ratified by South Africa.³ These treaties are binding international law and are therefore highly relevant in interpreting the rights in section 28 of the Constitution. Furthermore, the drafters of the Constitution relied heavily on the UNCRC, making its consideration important for the interpretation of section 28.⁴

Other, non-binding international treaties such as the ICESCR⁵ and European Social Charter are also relevant even though their influence may only be persuasive in nature. International declarations that stem from events such as the World Summit for Social Development are also not directly binding, but should also be considered.

Like section 28 of the Constitution, relevant international law focuses on the right to family care, parental care or alternative care, as well as the right to protection from abuse and neglect. These rights provide the framework within which the right to social services must be interpreted. This section details what services should be in place to give effect to the right to parental care and the right to protection from abuse and neglect as defined by international law. This consequently highlights the types of services that should exist in terms of the right to social services in the Constitution. The analysis of international law will classify the services that should be provided according to the rights they aim to realise. This will be explained in more detail in the chapter.

The chapter will show that the interrelation and complementarity of the different social welfare models described in Chapter 2 is reflected in one way or another in international law, where the focus is on prevention efforts and on strengthening the family for the ultimate protection of the child.

The prevention efforts described in international law and addressed in this chapter can fall either under the developmental model of social welfare or the institutional model. International law also deals with curative services such as institutional care once the other services have failed to provide adequate protection to the child.

¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), 26.

² *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), 35.

³ The UNCRC was ratified by South Africa on 16 June 1995 and the ACRWC signed on 7 January 2000.

⁴ See Chapter 4.

⁵ The ICESCR was signed on 3 October 1994.

Such services are more residual in nature but are still important for a comprehensive child protection system because, even with the best preventative efforts, the need to remove the child from a family can never be ruled out completely.

In essence all the services have a developmental aspect because they are firstly all derived from the right to family care, parental care and alternative care and the right to protection from abuse and neglect. The realisation of these rights obviously has an economic and a social impact on society. Secondly, investing resources in children creates very valuable human capital and is likely to strengthen the economic growth of the country in the long run.

This chapter therefore shows that, in terms of international law, the right to social services must be interpreted to incorporate approaches from all welfare models while shifting the focus to the developmental rather than the residual welfare model.

3.2 The UNCRC, ACRWC and related documents

3.2.1 The framework of the right to parental or family care and the right to protection from abuse and neglect

As indicated above, the rights to a family environment and the right to be protected against abuse and neglect provide the necessary framework to interpret the right to social services.⁶ Article 18 in the UNCRC, which gives every child the right to live in a family environment, and article 19, which contains the right of the child to be protected from abuse and neglect, are thematically linked to each other. This can be deduced firstly from the fact that they appear directly after each other in the treaty and, secondly, because the Committee on the Rights of the Child (from now on called 'the Committee') links these two articles under one theme in its reporting guidelines.⁷

The link between the right to family care and the right to protection against abuse, neglect and torture also exists under the ACRWC. The ACRWC contains the right of the child to grow up in a family environment in article 19(1). This article is very similar to article 18 in the UNCRC. The same can be said for article 16(2) of the ACRWC, which is similar enough to article 19 of the UNCRC to warrant comparison. This paper will first elaborate on how the articles are textually linked and then will address how they are linked by the Committee in the reporting guidelines.

In terms of article 18 of the UNCRC, parents have the primary responsibility for the care, upbringing and development of their children. Article 19 of the UNCRC obliges states to ensure that the child is protected against any form of abuse while 'in the care of parent(s) [...]' Article 19 of the UNCRC deals with protection against any form of abuse. In terms of article 19(1), measures must be taken to ensure that the child is free from all forms of abuse while in the care of parents, legal guardians or any other person who cares for the child. This means that the responsibilities of parents and families regarding their children's care and development are linked to the protection of children from abuse and neglect. Article 16 of the ACRWC is sufficiently similar to

⁶ J Sloth-Nielsen 'The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*' (2001) 17 *SAJHR* 210-231, 216-218.

⁷ Committee on the Rights of the Child *Reporting Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties Under Article 44, Paragraph 1(B), of the Convention* (1996).

article 19 of the UNCRC to warrant comparison.⁸ The small difference will be illustrated later in this chapter.

The right to family care (in whatever form) and the right to protection from abuse and neglect are also linked by the Committee's reporting guidelines, which require states to report to the UN on measures taken to realise the rights in the UNCRC. The guidelines are divided into different reporting categories. One of the categories is 'family environment and alternative care'. Under this heading, measures taken in terms of articles 5 and 18 (parental guidance and responsibility and state support to families in the exercise of these responsibilities) as well as in terms of articles 19 and 39 (protection against all forms of abuse and right to rehabilitation and social reintegration after abuse) must be reported. The Committee has therefore linked the responsibilities of parents and families to ensure the child's development with the right of the child to protection from abuse and neglect.⁹ Emphasising preventative action against any form of abuse or neglect, the need to establish social support programmes, not only for the child but also for those who care for the child, was incorporated.¹⁰ The similarity between the ACRWC and the UNCRC provides a strong incentive to apply similar categorisation to the rights in the ACRWC.

Various articles in the UNCRC are related to the rights to parental care, family care or appropriate alternative care and the right to protection from abuse and neglect. A more thorough analysis of the specific articles will follow shortly. Firstly, however, it must be noted that all the services derived from the related articles in the UNCRC and the corresponding articles in the ACRWC can be classified into five layers of protection. Firstly, international law mandates a range of services related to supporting the rights to parental care or family care. Secondly, a range of services are recommended aimed at remedying the effects if the first layer fails. These are services related to the right to appropriate alternative care. Thirdly there are a range of services recommended in relation to the right to be protected against abuse and neglect. This layer of services applies to children in any kind of care setting, including those in family care. International law also mandates that there should be curative services in place to ensure that the child who has suffered abuse or neglect is rehabilitated. Lastly, services are mandated for children with special needs.

From a service delivery point of view these layers need to be considered together with different points of interventions through primary, secondary and tertiary prevention. Basically each layer of services can fulfil a different form of prevention. Adoption is for example a tertiary intervention because it occurs once serious breakdown has taken place; but it is also a step which could prevent subsequent problems that in turn would perpetuate an inter-generational cycle of abuse and deprivation.

This shows that even specialised services have very strong preventative functions and this must be kept in mind when the value of individualised social services are discussed. Specialised individual social services are often criticised for not focusing on preventative efforts but the primary, secondary and tertiary prevention points show that even specialised and individual social services have preventative

⁸M Gose *The African Charter on the Rights and Welfare of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (2003), 57.

⁹ *Ibid*, 217.

¹⁰ *Ibid*.

functions.¹¹ To avoid confusion, the services in this paper are therefore classified according to the rights from which they originate rather than from what function they perform, as some services can have a preventative as well as a protective function. Since the rights from which these layers of services originate are reflected in the Constitution, a definition of the constitutional right to 'social services' should incorporate a reflection of the different layers as well.

3.2.2 Articles giving effect to the right to family care or parental care

Article 5 (UNCRC) and article 18 (ACRWC): The roles and responsibilities of the family

Article 5 of the UNCRC makes it the responsibility, right and duty of parents to provide appropriate direction and guidance to the child. While article 5 speaks about the rights of parents, members of the extended family or community also have responsibilities towards the child.¹² In relation to article 5, the Committee requests information on family structures within society, thereby recognising that different cultures, traditions and societal needs determine who cares for and protects the child.¹³ Such family-like structures must be recognised by the State. This is also acknowledged in terms of the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR.¹⁴ It is crucial that the rights of children and the responsibility of families (in the broad sense) are made known to children, parents, duty-bearers and other relevant stake holders to protect the rights of children in all the different family settings. In terms of services, this means that the State should make education programmes on the rights of children available to parents, caretakers and professional groups, such as social workers.¹⁵

There is no direct counterpart to article 5 of the UNCRC in the ACRWC. The ACRWC does, however, provide in article 18 that the family is the natural unit and basis of society and that its establishment and development shall enjoy the protection of the State.¹⁶ Article 18 focuses more on the right of the family than the right of the child and has been interpreted to be a particularly African expression of the notion of 'family'. Within such a notion of 'family', extended family members can also fall under article 18 of the ACRWC.¹⁷

Article 18 and 27 (UNCRC) and article 20 (ACRWC): The roles and responsibilities of parents

Article 18(1) of the UNCRC states that both parents have the common responsibility for the upbringing and development of the child. Article 20(1) of the ACRWC also places the primary responsibility for the upbringing and development of the child on parents 'or other persons responsible for the child'. 'Development' in both treaties is a very broad concept and suggests an objective measure for assessing if parents exercise responsibilities properly. The parents are failing in their duty if a child's

¹¹ Personal communication, J Loffel, 8 May 2006 [unpublished on file with the Children's Institute].

¹² Committee on the Right of the Child op cit note 7, 62.

¹³ Ibid, 62.

¹⁴ See article 10(1) of the ICESCR and Human Rights Committee, General Comment 17, Article 24 (1994).

¹⁵ S Detrick 'Parental Guidance' in S Detrick (ed) *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 115-123, 121.

¹⁶ Article 18(1). M Gose op cit note 8 has argued that article 5 in the UNCRC is related to article 18 of the ACRWC. The two articles can therefore be compared to each other.

¹⁷ Gose ibid, 97.

physical, psychological or intellectual development is being impaired by actions avoidable by the parents.¹⁸

In terms of article 18(1) of the UNCRC, states must ensure that *both* parents take responsibility for the child. Similarly article 18(2) of the ACRWC requires states to ensure 'equality of rights and responsibilities of both spouses with regard to children'. The ACRWC refers to 'spouses', which begs the question if this article also applies to unmarried parents of the child. However, such an interpretation would divert from the African notion of family mentioned above and therefore is an unlikely interpretation.¹⁹

Either way, if one accepts that the right to social services must be interpreted in light of the right to family or parental care, it would mean that policies encouraging equality between spouses (in terms of the ACRWC) and parents (in terms of the UNCRC) for the upbringing of the child would be in line with the Constitution. Examples of such measures are conditions of employment like as maternity and paternity leave, which encourage both the mother and the father to take part in their child's upbringing.²⁰

Since child-rearing is the responsibility of both parents, the Committee has stated that single parenthood should be studied and that relevant programmes should be established to meet the needs of single parents.²¹ Furthermore, family planning programmes and support programmes for vulnerable families are services that assist families with their responsibilities. Special attention should be paid to prevent child abandonment and appropriate assistance should be given to child-headed households.²²

Article 18(2) of the UNCRC obliges state parties to render appropriate assistance to parents or legal guardians in the performance of their child-rearing responsibilities. States must therefore ensure the development of facilities and services to assist parents in caring for children.²³ Article 20(2)(b) of the ACRWC contains a similar clause. Article 18(2) of the UNCRC (and by implication of their similarity, article 20(2)(b) of the ACRWC) have been interpreted to mean that states should assist families that are at risk of breaking down with practical and psychological help with regards to their child-rearing responsibilities.²⁴ This could include services for mothers with babies, play groups or youth clubs. Multi-disciplinary services, such as child guidance or school-based medical staff and advice centres, are also recommended in contributing towards child care.

In terms of implementation, it is recommended that small, locally developed services should be supported rather than investing in expensive public institutions.²⁵

¹⁸ R Hodkins & P Newell 'Parent's joint responsibilities assisted by the State' in R Hodkins & P Newell (eds) *An Implementation Handbook on the United Nations Convention on the Rights of the Child* (1998) 225-236, 227.

¹⁹ Gose op cit note 8, 98.

²⁰ R Hodkins & P Newell op cit note 18, 230.

²¹ R Hodkins & P Newell 'Child's right to an adequate standard of living' in P Hodkins & P Newell (eds) *An Implementation Handbook on the United Nations Convention on the Rights of the Child* (1998) 335- 368, 361.

²² Hodgkin *ibid*, 362.

²³ This section is also related to section 27 (states must assist parents to ensure that the conditions of living are such that they enable the child's development; with regard to nutrition, clothing and housing, the State should provide material support whenever necessary) and article 26, which states that a child must benefit from social security and social insurance.

²⁴ S Detrick op cit note 15, 306.

²⁵ Hodgkin op cit note 18, 233.

While parents in need are the most relevant, the State should aim for universal assistance as means-tested assistance may deter the most marginalised from accessing the services.²⁶ This is an aspect of service delivery that fits neatly into the developmental model of welfare discussed earlier. State supported, locally developed facilities serve multiple purposes. They protect the child from abuse and neglect and give community members work in supervising and looking after the children. It also frees the time of the parent to engage in income-generating activities.

Article 18(3) of the UNCRC and article 20(2)(c) of the ACRWC state that children of working parents have the right to benefit from child-care services and facilities 'for which they are eligible'. The last provision is included because during the debates on this section, UN delegates realised that developing countries do not have the resources to implement such a right for everyone. They also recognised that in developing countries such functions were often provided by the local community or by private parties. Arguably the provision of these services is a state function and therefore private parties that perform these functions should be financially supported by the State.

The Committee requests information on initiatives taken by states to provide early childhood development services, day-care centres and crèches, as well as education services for young children, especially those from disadvantaged communities. The Committee also requests information on what type of family counselling services and training activities exist for professionals such as social workers.²⁷ Article 18(3) states that the State must ensure the 'development' of institutions, facilities and services, which means that the State can never be complacent about service delivery to children.²⁸ This is another example of how the services in international law have a developmental welfare focus.

States have a duty, under the ACRWC, to provide children with care services and facilities. It does not mention the duty to ensure the 'development' of such services, as was found in the UNCRC. There is no limitation equal to 'for which they are eligible' as found in the UNCRC, which could mean that the ACRWC provides for a higher level of service provision for the children of working parents than the UNCRC does.²⁹ The UNCRC was drafted to encourage as many states as possible to sign up, which makes the latter interpretation less plausible.

Article 27 of the UNCRC is relevant because it deals with the right of the child to an adequate standard of living. The ACRWC does not contain an equivalent clause but has a similar provision in article 20(1).³⁰ The UNCRC states that the standard of living must facilitate the child's survival and development.³¹ Parents have the primary responsibility to fulfil the needs of the children but the State has a duty to assist parents and others responsible for the child through material assistance and support programmes. Article 20(1) of the ACRWC has similar implications.

In terms of the ACRWC and the UNCRC, states must provide programmes and material assistance to parents and other persons responsible for the child. Material assistance in terms of housing, health care and nutrition is specifically

²⁶ Ibid.

²⁷ Committee on the Rights of the Child op cit note 7, 106.

²⁸ Hodgkin op cit note 18, 233.

²⁹ Gose op cit note 8, 39.

³⁰ D M Chirwa 'The Merits and Demerits of the African Charter' (2002) 10(2) *International Journal on the Rights of the Child* 157-177, 164.

³¹ See article 27(1).

mentioned in both treaties.³² It is not argued that material assistance in relation to housing, health care and nutrition are social services. The point is, however, that when reading articles 18 and 27 of the UNCRC and article 20(1) and article 18(2) of the ACRWC together, one must conclude that *both* parents have the obligation to secure such a living environment for the child. States therefore have an obligation to ensure that a system of maintenance is put in place that enables single mothers and female-headed households, who are often in the bottom income groups, to claim assistance from the fathers (and *vice versa*). Certain aspects of such a system would fall under social services. For example, educating single parents about their right to maintenance, assisting with the maintenance claims and procedures, etc., would fall under social services. Article 18(3) of the ACRWC and article 27(4) of the UNCRC specifically mention the right of the child to maintenance, regardless of the parents' marital status.³³

The right to maintenance as mentioned in the UNCRC means more than just the payment of money. Children have the right for both parents to be involved in their upbringing.³⁴ Even though material assistance given to parents would fall under the broader notion of overall welfare programmes, facilitating the involvement of both parents in the child's upbringing and certain aspects of a functioning maintenance system can be classified under 'social services'.

Article 9 (UNCRC) and article 19 (ACRWC): The right not to be separated from parents

Both these treaties grant children the right not to be separated from their parents.³⁵ The UNCRC states that children shall not be separated from their parents against 'their' will whereas the ACRWC states that no child shall be separated against 'his' will. The UNCRC uses 'their' because the drafters sought to achieve a balance between the rights of the parents and the rights of the child.³⁶ The clause in the UNCRC is based on the protection of privacy found in article 17 of the ICCPR.³⁷ The article in the ACRWC deals only with the will of the child and is therefore more child-friendly than the UNCRC.

The ACRWC however does not include the right of 'all interested parties' to have an opportunity to participate in court proceedings on potential separation as is found in the UNCRC. This can mean that the will of the child will not come to the attention of the judicial authority.³⁸

In terms of the UNCRC, measures must be taken to ensure that all parties, including the child, have the right to participate in such proceedings and to make their views heard.³⁹ The UNCRC refers to a 'competent authority' whereas the ACRWC speaks about a 'judicial authority'. A 'competent authority' refers to an authority which has the skill to determine what is in the child's best interest. This skill can be acquired through formal training (such as social work, legal case work or psychology) or

³² See article 27(3) of the UNCRC and article 20(2)(a). The Charter also mentions education, which the UNCRC does not.

³³ Gose op cit note 8, 99.

³⁴ Hodgkin op cit note 18, 229.

³⁵ Article 9 of the UNCRC and article 19 of the ACRWC.

³⁶ Gose op cit note 8, 101-102.

³⁷ Ibid.

³⁸ Ibid, 100.

³⁹ R Hodgkins & P Newell 'Separation from parents' in R Hodgkins & P Newell (eds) *Implementation Handbook for the Convention on the Rights of the Child* (1998) 119-336, 120.

through experience (for example, by being a community or religious arbitrator).⁴⁰ Under the ACRWC, the only authority that can make such a decision is a judicial one. The UNCRC also provides for the decision to be scrutinised under judicial review. The two provisions are therefore substantially the same.⁴¹ Regardless of which authority is dealing with the matter, services facilitating the true participation of all parties involved would fall under social services.

Homelessness or poverty of the parents, or the parents' failure to send the child to school, should not be regarded as a reason to remove the child from the family. The State should make resources available to remedy the situation while trying to keep the child within the family.⁴² This is very important for South Africa, where many children live in poverty. Under both the ACRWC and the UNCRC, the family is entitled to protection by society and the State.⁴³ The child should therefore only be removed from the family if there is no other alternative.

When children are removed from their parents and placed in the care of the State, they have the right to remain in contact with their parents unless it is not in their best interest.⁴⁴ This is because children are less likely to be reunited with their parents if contact is not maintained. Children who do not live with their parents, such as street children and refugee children, for reasons of poverty, abuse or neglect by the parents for example have the right to an opportunity to be reunited with their parents⁴⁵. In terms of the UNCRC such a right only comes into affect if it is in the best interests of the child. The ACRWC provides for the right to remain in contact with the parents regardless of whether this is in the best interest of children. It may, however, not always be in the best interest of the child to remain in contact, for example when the child has suffered abuse at the hands of the parent or guardian. Such a protection should be read into the ACRWC. Social services providers must therefore assess if contact between the child and the parents is in the best interests of the child. If it is, they must facilitate contact between the parents and the child. Social services must also be able to offer family reunification programmes for children who do not live in a family environment.

All services strengthening the family and preventing the break-up of the family fit in with the developmental or the institutional welfare approach. The developmental aspect is that it is arguably cheaper for the State to provide services that enable the child to stay with and be protected by the family than to finance the care and protection of children through costly, state-run institutions. The prevention of family breakdown can therefore be seen as promoting the social as well as economic development of the country. Furthermore, international law recognises that it is best for the child's development to grow up in the family environment. Besides having a social responsibility, the State should also have an economic interest in ensuring that children can grow up to reach their full potential. If the State wishes to combine social development with economic development, it should avoid removing the child from the family because it is going to be more costly in the short- and long-term.⁴⁶

⁴⁰ Ibid, 124.

⁴¹ Gose op cit note 8, 100.

⁴² Ibid, 125.

⁴³ International Covenant on Civil and Political Rights, article 23(1); African Charter on Human and People's Rights, article 18.

⁴⁴ See article 9(3) of the Convention and article 19(2) of the ACRWC.

⁴⁵ Hodkins op cit note 39, 122.

⁴⁶ P Crawford *Child Protection: Theoretical Background* (2001) 503.

3.2.3 Articles giving effect to the right to appropriate alternative care

Article 20 (UNCRC) and article 25 (ACRWC): Deprivation of the family environment

Article 20 of the UNCRC and article 25 of the ACRWC provides for children who are permanently or temporarily deprived of their family environment, for whatever reason. In terms of both provisions, these children are entitled to special protection⁴⁷. The UNCRC requires the State to ensure that such children receive special protection and assistance. The obligation under the ACRWC to provide special care and assistance is not limited to the State. In terms of the ACRWC, all of society has a duty to provide special care and protection for such children.⁴⁸

The type of protection or alternative care that the State chooses is left to the national traditions in terms of article 20(2) of the UNCRC. In both the ACRWC and the UNCRC the articles mention examples such as foster placement, or placement in suitable institutions.⁴⁹ In addition to these examples, the UNCRC mentions *kafalah* of Islamic law, which the ACRWC does not mention. The UNCRC also considers adoption as an alternative placement, while the ACRWC leaves it out.

The UNCRC also recommends that, when considering alternative placement 'solutions' for the child, the child's upbringing should take place in a similar cultural, linguistic, ethnic and religious background. The ACRWC has substituted the word 'solutions' found in the UNCRC with the phrases 'alternative family care of the child' and 'the best interest of the child'. The UNCRC therefore seems to be broader than the pure concept of 'alternative family care'.⁵⁰ In the face of HIV/AIDS, which leaves many children without parents or family to care for them, this article is very relevant to the South African context. Services that offer, facilitate and monitor the placement of children in alternative care arrangements must be made available. This will also ensure that children receive the special protection they are entitled to.

This UNCRC article applies mainly to social workers, foster caregivers and adoptive parents. Members of the Committee have recommended that states draw on UN publications such as the *Human Rights and Social Work: A Manual for Schools of Social Work and the Social Work Profession*. The *1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally* should also be considered in relation to the implementation of this article.⁵¹

Institutional placement for children is a last resort especially for young children whose development depends on one-to-one relationships. In many countries, lots of children are placed in institutional care because the State has failed to invest money in keeping the child with his or her family. The placement of children with persons other than their family can impede their physical, intellectual and emotional development – this is why they are entitled to special protection and assistance.⁵² The fact that children are entitled to special protection goes to the heart of society's duty: if parents or family cannot meet the needs of children, the State in terms of the UNCRC, and

⁴⁷ Article 20(1) of the UNCRC and article 25(1) of the ACRWC.

⁴⁸ Gose op cit note 8, 103.

⁴⁹ Article 25 (2)(a) of the ACRWC and article 20 (3) of the UNCRC.

⁵⁰ Ibid, 105.

⁵¹ R Hodkins & P Newell 'Children deprived of their family environment' in P Hodkins & P Newell (eds) *An Implementation Handbook on the United Nations Convention on the Rights of the Child* (1998) 257-266, 257.

⁵² Ibid, 259.

society at large in terms of the ACRWC, has a duty to meet the needs of these children.

The needs of children deprived of a family are greater than just alternative placement. Their development is also endangered and they are vulnerable to abuse and a variety of services are often required. This can be difficult because social service professionals frequently have trouble enlisting other service providers to assist such children. In this regard the Committee has stated that there is a need for different state departments to co-ordinate their activities.⁵³ Professionals and service providers across the spectrum need to work together. Part of the State's duty is to put mechanisms in place to ensure the co-ordination of the various services.

Adoption and foster placements are social services under the definition set out above. Studies have shown that children in foster and adoptive care are more likely to use other social services as well, such as those directed at their mental health. It can be argued that, due to the difficult position that children in alternative care find themselves in, foster placement should be seen as a gateway to many other services that the child may need in his or her particular situation.⁵⁴ Social service professionals dealing with placement cases should therefore be able to refer the child to a whole range of services that may be required. They should also have the power to enforce the provision of certain services from different departments.

Article 21 (UNCRC) and article 24 (ACRWC): Adoption

Linked to children deprived of family care is article 21 of the UNCRC and article 24 of the ACRWC, which deals with adoptions. As noted above, article 20 of the ACRWC does not include 'adoptions' in its list of possible alternative options but has a separate article on this topic. Article 21 of the UNCRC sets out minimum requirements for the adoption procedures.⁵⁵ Adoption addresses the need for children to stay in a family-like environment. The best interest of the child must be 'the paramount' consideration in terms of adoptions under both the UNCRC and the ACRWC. In terms of the UNCRC, this is a higher standard than the usual requirement of the child's best interest being a 'primary' consideration. This means that no interest other than the child's may take precedence in the case of adoption.

Article 24 of the ACRWC says that state parties shall establish competent authorities to deal with matters of adoption.⁵⁶ The UNCRC does not speak about the 'establishment'⁵⁷ of such authorities. This could create problems in situations where such authorities do not exist. The ACRWC leaves out the term 'legal' in relation to guardians. The UNCRC, by insisting on the status in relation to 'legal' guardians, ignores the fact that children may be cared for by people other than their 'legal' guardians and that these guardians may have important insights about the benefits of the adoption.⁵⁸

⁵³ Ibid.

⁵⁴ E Farmer, B Burns, M Chapman, S Phillips, A Angold & E Costello 'Use of Mental Health Services by Youth in Contact with Social Services' (2001) *Social Service Review* 606-624, 621.

⁵⁵ S Detrick 'Adoption' in S Detrick (ed) *A Commentary on the United Nations Convention of the Rights of the Child* (1999) 341-360, 343.

⁵⁶ Article 24(a).

⁵⁷ Article 21(a).

⁵⁸ Gose op cit note 8, 105.

In terms of both the articles, the persons concerned have to give their informed consent on the basis of counselling. Note that the ACRWC refers to 'appropriate' counselling, whereas the UNCRC only speaks about 'counselling as may be necessary'. This difference should be considered as merely textual. An important difference, however, is that the ACRWC states that mechanisms must be established to monitor the well-being of the adopted child. In terms of social services, this could mean that social service professionals must provide adequate counselling for everyone involved and that they must ensure that the child's placement is monitored and evaluated. Under the UNCRC, the duty to review the placement of the child is covered by article 25. This article is not mirrored in the ACRWC.

Article 25 (UNCRC): The placement of the child

Article 25 of the UNCRC obliges state parties to review the placement of the child periodically. This applies to children who have been placed in alternative care because they are deprived of their family environment for whatever reason – this would include child refugees, children deprived of their liberty and children placed in custodial settings.⁵⁹ The review is directed at the treatment a child receives in the placement and at all other conditions related to the placement. Commentary on this article refers to placement in public, as well as private settings.⁶⁰

Services required under the right to alternative care aim to ensure that the child is placed in another family-like environment. Such services have a developmental aspect as it is cheaper for the State and more beneficial for the child to place children in a family-like environment. Services under these provisions deal with systematic requirements that must be in place to ensure that the alternative care placement of the child does in fact protect and enhance the child's development.

3.2.4 Articles giving effect to the right to be protected against abuse and neglect

Article 19 (UNCRC) and article 16 (ACRWC): Protection against all forms of violence, inhuman and degrading treatment

Article 16 of the ACRWC corresponds to article 19 of the UNCRC. Article 16(1) is almost identical to the related UNCRC article, except that it includes the prevention of torture, which is covered in a separate article in the UNCRC.⁶¹ Article 16(1) also leaves out the words 'all forms of physical or mental violence' which appears in article 19(1) of the UNCRC. The ACRWC includes inhumane and degrading treatment under article 16, whereas the UNCRC deals with this under article 37, which deals mainly with juvenile justice. The UNCRC also contains protection against exploitation in article 19, which is not found under article 16 of the ACRWC.

The UNCRC states that the child must be protected 'while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'. The ACRWC

⁵⁹ S Detrick 'Periodic Review of Placement' in S Detrick (ed) *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 436-452, 346.

⁶⁰ R Hodkins & P Newell 'Child's right to periodic review of treatment' in R Hodkins & P Newell (eds) *An Implementation Handbook on the United Nations Convention on the Rights of the Child* (1998) 341-346, 341.

⁶¹ Article 37(a) of the UNCRC protects against 'torture or other cruel [...] treatment or punishment'. Article 16(1) of the Charter leaves out the words 'or other cruel' and 'or punishment' which could be interpreted as a lower level of protection. See M Gose op cit note 8, 56.

states that the child must be protected while 'in the care of the child'. No interpretation of this clause makes sense and has to be seen as a mistake by the drafters. The substantive content of articles 19(1) and 16(1) is therefore the same.⁶² The UNCRC in article 19(2) also provides for the possibility of judicial involvement. This possibility is not mentioned in the ACRWC but would have to be interpreted into the ACRWC provision.⁶³

Article 19 of the UNCRC and article 16 of the ACRWC are directly relevant because they oblige the State to take all appropriate legislative, administrative, social and educational measures to protect children against abuse and neglect. Many of these measures would be social services aimed at protecting the child from all forms of physical or mental violence, injury or abuse, neglect, or negligent treatment and maltreatment or exploitation, including sexual abuse.⁶⁴

In terms of article 19(2) of the UNCRC and 16(2) of the ACRWC support for the child and those who care for the child is a way of preventing the neglect and abuse of the child. In the UNCRC, article 19(2) provides that protective measures include the establishment of social programmes to provide support for the child and for those who care for the child.⁶⁵ The ACRWC provides that protective measures shall include the establishment of special monitoring units to provide necessary support for the child and those who care for the child.⁶⁶

The phrase 'while in the care of parents, legal guardians and any other person who has the care of the child' in article 19(1) of the UNCRC covers the prevention of inter-familial abuse and neglect, as well as abuse and neglect in private and public institutions such as schools, hospitals and crèches.⁶⁷ With respect to article 19(2), the Committee wishes to have information on 'social programmes' that provide support for the child and for those who care for the child, including rehabilitation mechanisms and measures adopted for the identification, reporting, referral, investigation, treatment and follow-up of instances of maltreatment. This includes the existence of confidential help lines, advice or counselling for child victims of violence, abuse or neglect. Special training for professionals is also requested.⁶⁸

'Special monitoring units' required under the ACRWC could include police, NGO, hospital or school-based units that identify and follow up on child abuse and neglect. It is not clear if 'special monitoring units' would provide the same amount of support for the child – and those caring for the child – as social programmes would. Either way, all these services should be included under the right to social services.

In terms of article 19 of the UNCRC, the child has the right to protection from 'all forms of violence'. Services for women and children suffering from domestic violence are therefore also required. States must provide services to families with the aim to prevent domestic violence. Research into the causes and triggers of domestic

⁶² Gose *ibid*, 57.

⁶³ *Ibid*, 58.

⁶⁴ Gose *op cit* note 8, 55.

⁶⁵ S Detrick 'Abuse and Neglect' in S Detrick (ed) *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 318-329, 321.

⁶⁶ See article 16(2) of the Charter.

⁶⁷ It was already pointed out earlier that the Charter here refers to 'while in the care of the child' in article 16(1). No sense can be made of this and it is therefore assumed to be a mistake.

⁶⁸ *Ibid*, para 90.

violence should be promoted in terms of this article.⁶⁹ Since child abuse cases are often unreported, the State should put confidential help lines in place. There should be clear procedures on accessing these and this should be made widely known to children and caregivers in all areas, including children in institutions.

Again the reporting of child abuse cases requires effective inter-departmental collaboration. The State should set out clear guidelines to ensure that departments can work together to deal with child abuse cases.⁷⁰ In terms of article 19 in the UNCRC and by implication also in the ACRWC, the Committee has welcomed the employment of social service professionals to deal with child abuse cases specifically. They also encourage efforts to establish community-based day-care centres and family education programmes.⁷¹ Training of specialised personnel has also been welcomed. The right to treatment and follow-up on incidences of child abuse indicate that article 19 of the UNCRC is also inextricably linked to article 25 of the UNCRC, which deals with the periodic review of care and treatment, and with article 39, which provides for rehabilitation and reintegration services for child abuse victims.⁷² The latter two provisions are missing from the ACRWC.

Neglect, negligent treatment or maltreatment as found in both the ACRWC⁷³ and the UNCRC may be deliberate, but it can also stem from the inability to provide appropriately for the child. The latter is particularly common in instances where there are no child-care facilities available for working parent families. This links article 19 of the UNCRC and article 16 of the ACRWC with article 18 of the UNCRC and article 20(2)(c) of the ACRWC in requiring that states assist parents in their child-rearing responsibilities through material assistance or through the establishment of facilities and institutions.

Article 27(2) of the UNCRC that deals with the child's adequate standard of living and article 20(2)(a) of the ACRWC, which provides that the State must assist parents, are therefore also preventative measures. Parents must receive material and social services assistance to prevent the removal of the child from the parents. If families are assisted by the State in meeting basic needs, particularly those related to nutrition, clothing and housing, parents will be able to provide better for the child's needs. The ACRWC adds to these basic needs by including health and education. Practically, the provision of basic needs will ensure that certain forms of neglect and negligent treatment of the child, in terms of the UNCRC, are avoided. Material assistance is not social services but would fall under the broader category of welfare services. International law therefore recognises that the delivery of social services must take place amongst broader welfare initiatives that also prevent and protect against child abuse and neglect.

The services recommended in relation to protection from abuse and neglect are also related to physical and mental violence, including humiliation, harassment, isolation and witnessing violence within the home and in the community. They also deal with neglect, negligent treatment, abuse, degradation and various forms of exploitation. This is clearly a social development issue as children who have suffered from or experienced violence as youngsters are more likely to engage in anti-social

⁶⁹ R Hodkins & P Newell 'Child's right to protection from all forms of violence' in R Hodkins & P Newell (ed) *Implementation Handbook for the Convention on the Rights of the Child* (1998) 237-255, 248.

⁷⁰ *Ibid*, 250.

⁷¹ *Ibid*, 250.

⁷² *Ibid*, 251.

⁷³ Note that the Charter omits the word 'negligent treatment'.

behaviour when older.⁷⁴ Children who suffer abuse or neglect are hampered developmentally as well. The State should have a social, as well as an economic interest in preventing this situation. Due to the economic aspect of these services it can be argued that such services also fit neatly in to the developmental approach to social welfare.

3.2.5 Articles giving effect to the right to rehabilitative services for children who have suffered abuse, neglect or exploitation

Article 39 (UNCRC) and related articles: The right to recovery, rehabilitation and re-integration

Related to all the protective provisions above is article 39 of the UNCRC, which provides for the promotion of the child's physical and psychological recovery, as well as for the social integration of the child after he or she has been abused, neglected, exploited, tortured or has suffered any other form of cruel, inhumane or degrading treatment or punishment. Article 39 deals with the rehabilitation and reintegration of any child victim of violence, neglect, abuse or exploitation. No such provision is found in the ACRWC.

Article 39 of the UNCRC is related to articles 19 (prevention of any form of abuse), article 32 (the right to be protected from economic exploitation), article 33 (protection against the use of drugs), article 34 (protection against sexual exploitation), article 35 (protection against child trafficking), article 36 (protection against any other form of exploitation) and article 37 (protection against torture or other cruel, inhumane treatment or punishment).⁷⁵ The Committee has stated that article 39 applies to a wide range of potential child victims including child refugees (article 22), child labourers (article 32), drug-abusing children and children trafficking drugs (article 33) and children in the juvenile justice system (articles 37 and 40).⁷⁶

Article 39 becomes relevant once the preventative and the protective provisions have failed and therefore has a remedial function. The ACRWC fails to speak to the recovery from child abuse and neglect. This is a major omission as state parties are left to deal with it at their own discretion once the protective layers of child services have failed.

The UNCRC requires that, in terms of article 39, such recovery and reintegration must take place in an environment which fosters the health, self-respect and dignity of the child. There are unfortunately no guidelines on how such rehabilitation should take place, but it seems obvious that services provided in terms of this article should be individually tailored to the particular situation in which the child finds itself.⁷⁷

The Committee has often indicated that reintegration and rehabilitation programmes alone are insufficient.⁷⁸ Hodkins points to the *Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography* report to the General Assembly

⁷⁴ Hodkins op cit note 65, 240.

⁷⁵ R Hodkins & P Newell 'Rehabilitation of Child Victims: Article 39' in R Hodkins & P Newell (eds) *A Handbook on the Implementation of the United Nations Convention on the Rights of the Child* (1998) 529-535, 530.

⁷⁶ Ibid.

⁷⁷ S Detrick 'Physical and psychological Recovery and Social Reintegration of the Child' in S Detrick (ed) *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 666-673, 670.

⁷⁸ Hodkins op cit note 75, 531.

as a guide in this matter. The report states that rehabilitation is a long and difficult process but that it can be assisted by programmes focus on food and shelter, placement in schools, skills training, medical and psychological help and, where possible, placement in foster care. Reintegration into the family is often difficult. There is also a lack of awareness regarding the pressing need for rehabilitation, treatment and recovery of child victims.

The *Agenda for Action* adopted by the World Congress against Commercial and Sexual Exploitation of Children has recommended that services should include social, medical and psychological counselling for the families and the children. Personnel should receive gender-sensitive training. Measures should also promote alternative means for the family to support itself to avoid further exploitation of the child.⁷⁹ This article paves the way for more services that the State is obliged to provide in terms of poverty alleviation mechanisms. The State needs to enable families to support children without having to resort to exploitative practices such as child labour.

Rehabilitative services have a developmental social welfare element because the child's full development is hampered when he or she has suffered any form of abuse, neglect or exploitation. The rehabilitation of children who have suffered abuse, neglect and exploitation is a developmental issue because the child has a greater chance of being self-reliant and independent later in life if he or she has received help to deal with traumatic experiences.

3.2.6 Articles giving effect to the right to services for children with special needs/vulnerable children

Article 22 (UNCRC) and article 23 (ACRWC): Refugee children

Article 22 of the UNCRC and article 23 of the ACRWC deal with refugee children. Refugee children have a right to 'appropriate protection and humanitarian assistance' aimed at enabling them to enjoy the same rights set out in the UNCRC, ACRWC and other international law binding on the State. Family-tracing services for family reunification (if this is in the best interest of the child) must be made available in terms of both these provisions. For unaccompanied children seeking asylum, the UN High Commission for Refugees has developed guidelines which state that unaccompanied children should be interviewed and registered. A guardian or adviser should be appointed.⁸⁰ Refugee children are entitled to the same protection as other children who are displaced from the family environment.

Article 22(2) of the UNCRC and article 23(2) of the ACRWC state that the protection of refugee children requires cooperation with the United Nations, inter-governmental organisations and NGOs.⁸¹ The ACRWC refers only to international organisations, which would not include all the organisations mentioned under the UNCRC. It seems therefore that, under the UNCRC, cooperation is required with a broader range of institutions.⁸² Either way, these institutions should assist the State to trace the child's parents and to obtain the necessary information for the reunification of the child with his or her family. If the child cannot be reunited with the parents, the child shall be

⁷⁹ *Ibid*, 532.

⁸⁰ United Nations High Commission for Refugees *Model Guidelines on Policies and Procedures in Dealing with Unaccompanied Children seeking Asylum* (1997).

⁸¹ Committee on the Rights of the Child *op cit* note 7, 119-220.

⁸² Gose *op cit* note 8, 122.

accorded the same protection as any other child permanently or temporarily deprived of the family environment.

Article 23 (UNCRC) and article 13 (ACRWC): Children with disabilities

Article 23 of the UNCRC and article 13 of the ACRWC deal with the rights of children with disability. They have the right to special care in terms of the UNCRC and special protection in terms of the ACRWC. The UNCRC states that the right to special care shall be provided free of charge, taking into account the financial resources of the parents and others caring for the child.⁸³ The ACRWC does not mention anything about the special care and protection being extended to children with disabilities free of charge.

In terms of the UNCRC, states should ensure that the child has access to rehabilitation services that maximise his or her optimum level of independence and can achieve the fullest possible social integration and individual development.⁸⁴ The UNCRC also states that children with disabilities should have the right to education and health care services. These services are not provided for in the ACRWC. The UNCRC has been interpreted to mean that support, such as respite care and attendant care, should be provided to families to avoid the institutionalisation of the child. Furthermore, information about disability and the prevention of disability should be made available to the parents and the community.⁸⁵

Both the ACRWC and the UNCRC state that children with disabilities have the right to be prepared for employment through vocational training. The ACRWC goes a step further and states that people with disabilities should gain access to public highways, buildings and other places to which they may want access to.⁸⁶

Services directed at children with special needs also focus on keeping the child with the family, and enabling the family to deal with the special needs of the child. These are developmental aspects means that the developmental needs of the child are met and the State does not have to provide the care and protection. These services, like all the others set out above, fit in with the developmental social welfare approach.

3.3 Other international law agreements

This section will discuss other binding international law. The above discussion on the UNCRC and the ACRWC emphasised the importance of protecting the family environment where the child lives. These treaties recognise the vulnerability of the child and the need for special measures of protection. Many of the treaties dealt with below are older provisions than the UNCRC and the ACRWC. They provided the basis upon which detailed child rights treaties were drafted. They do not add anything to the range of services discussed above. However, this section aims to show that the sentiments expressed in the previous section of this paper are largely reflected in the broader international law environment.

⁸³ Article 23(3) of the UNCRC.

⁸⁴ R Hodgkin & P Newell 'Rights of disabled children' in R Hodgkin & P Newell (eds) *Implementation Handbook for the Convention on the Rights of the Child* (1998) 293-314, 300.

⁸⁵ This is a very basic discussion of the rights to services for children with disabilities. For more detail, information and recommendation on the promotion of the rights of children with disabilities see Recommendations of the Committee on the Rights of the Child *General Discussion on the Rights of Children with Disabilities held on the 6th of October 1997*.

⁸⁶ Article 13(3) of the ACRWC.

This section also deals with non-binding instruments, which still have a high persuasive value.

3.3.1 Binding international law

The *Universal Declaration of Human Rights*⁸⁷, which was the first binding human rights declaration, recognises that the family is the natural and fundamental group unit of society. Under article 16(3) the family is entitled to protection by society and the State. Article 25 states that 'everyone has the right to a standard of living adequate for the health and well-being of himself or herself and of his or her family, including food, clothing, housing, medical care and necessary *social services* [...]'⁸⁸ Motherhood and childhood are entitled to special care and assistance.⁸⁹

It is not clear what is meant by 'social services' in this provision. It must, however, mean something different to food, clothing, housing and medical care otherwise it would not have been repeated in the section. This confirms the notion of social services being distinct from other welfare services.

The *International Covenant on Civil and Political Rights*⁹⁰ also states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.⁹¹ Section 23(1) provides that the widest possible protection and assistance should be accorded to the family, particularly while it is responsible for the care and education of dependent children. General Comment 19 of the Human Rights Committee elaborates on article 23 and states that the concept of the family may differ and that domestic legislation needs to take these differing family structures into account.⁹² This is also guaranteed through Article 17, which prohibits arbitrary and unlawful interference with the family because it guarantees the protection of the family and its members.

Article 24 of the ICCPR addresses the rights of the child as a member of the family. Article 24(1) states that every child has the right to measures of protection by the family, society and the State, as required by her/his status as a minor. General Comment 17 states that the ICCPR expressly indicates that states must adopt measures affording minors greater protection than adults.⁹³ The types of measures are not specified, but they must be determined by considering the protection needs of the children. The General Comment however specifically states that economic and social measures should be taken to reduce infant mortality, to eradicate malnutrition amongst children and to *prevent abuse or exploitation of children*.⁹⁴ The responsibility for the necessary protection lies with the family, society and the State. Members of the family should create conditions to promote the

⁸⁷ Adopted on 10 December 1948.

⁸⁸ Own emphasis added.

⁸⁹ Article 25(2).

⁹⁰ Adopted in 1976, signed by South Africa on 3 October 1994 and ratified on 10 December 1998.

⁹¹ International Convention on Civil and Political Rights Article 23(1).

⁹² Human Rights Committee *General Comment 19, Article 23, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 at 28 (1994), 1.

⁹³ Human Rights Committee *General Comment 17, Article 24, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 at 23 (1994).

⁹⁴ See Human Rights Committee General Comment 17 *ibid*, 3. Acts of violence, cruel and inhuman treatment, forced labour, prostitution as well as the use of children in the illicit trafficking of drugs are specifically mentioned. *Own emphasis added*.

harmonious development of the child's personality. Society, social institutions and the State have the responsibility to assist the parents and the family in protecting the child.⁹⁵

The *African Charter on Human and People's Rights*⁹⁶ also states that the family shall be the natural unit and basis of society. The State is to take care of the family's physical health and morals.⁹⁷ The State should also assist the family, which is the custodian of morals and transitional values recognised by the community.⁹⁸ In terms of socio-economic rights, the Charter simply states that all people shall have the right to their economic, social and cultural development.⁹⁹ States have the duty to ensure that this right is realised.¹⁰⁰

3.3.2 Non-binding international law agreements

Apart from the above agreements, there are a number of international law instruments that point to the fact that a country's social and economic development is best insured by investing in the social protection of children.¹⁰¹ A number of international law instruments state that the protection and development of children is best secured in a family environment. This notion has been accepted in a variety of international law instruments.

Article 10(1) of the *International Covenant of Economic, Social and Cultural Rights*¹⁰² also deals with the importance of the family. Article 10(1) states that the widest possible protection and assistance should be accorded to the family. The family, so the article continues, is the fundamental group unit of society and it should be protected, particularly when it is responsible for the care and education of dependent children. The UN Committee on Economic, Social and Cultural Rights in terms of article 10(1) requires information on measures taken to strengthen and protect the family when it is responsible for the care and education of dependent children.¹⁰³ Any provisions of services that prevent the abuse or neglect of children would fall into this category and would constitute 'social services'.

Article 10 of the ICESCR goes on to say that mothers should be afforded special protection during and after child birth.¹⁰⁴ Special measures of protection and assistance should be taken without discrimination of any kind. Children should be protected from economic and social exploitation. By linking special measures of protection and assistance to the principle of non-discrimination, the ICESCR emphasises that states may not discriminate against specific groups of children. In addition, states are obliged to provide vulnerable groups with special protection and assistance to ensure equality.¹⁰⁵ Comments from the UN Committee on Economic

⁹⁵ General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 23 (1994), 6.

⁹⁶ Adopted 27 June 1981. Signed and ratified by South Africa on 3 June 2002.

⁹⁷ Article 18(1).

⁹⁸ Article 18(2).

⁹⁹ Article 22(1).

¹⁰⁰ Article 22(2).

¹⁰¹ Crawford op cit note 46, 510; M Grey 'The Role of Social Workers in Developmental Social Welfare: Is there a Place for them?' (1996) 2 *Social Work Practice* 8-13, 9.

¹⁰² Adopted on 16 December 1966. Signed by South Africa on 3 October 1994, but not ratified.

¹⁰³ Detrick op cit note 15, 307.

¹⁰⁴ See article 10(2).

¹⁰⁵ G v Bueren 'Alleviating Poverty Through the Constitutional Court' (1999) 15 *SAJHR* 52-74, 56.

Social and Cultural Rights, as well as comments from the Committee on the Rights of the Child, indicate that vulnerable groups of children require special care and protection.¹⁰⁶ As pointed out in the discussion on the UNCRC, these children include amongst others those who are temporarily or permanently deprived of their family environment, such as refugee children, children with disabilities and children living and working on the streets.¹⁰⁷

Article 16 of the *European Social Charter*¹⁰⁸ is interesting as well because it provides that states must undertake to promote the legal and social protection of the family, which is the fundamental unit of society. The Committee of Independent Experts, which is the body supervising the implementation of the European Social Charter, has recognised that the industrial revolution created social changes that produced the modern state in which families do not function as they did traditionally. Family welfare, according to the experts, cannot be left only to the family anymore. Family policies that operate in areas with particularly pressing needs must be implemented.¹⁰⁹

The *World Summit for Development* which took place in Copenhagen in 1995 confirmed that the ultimate goal of social development is to improve and enhance the quality of life of all people.¹¹⁰ An environment in which such improvement can take place gives a strengthened role to the family.¹¹¹ Particular efforts should be made to protect children and youth, as they play a crucial role in the development of a country in the long run. The child is protected by promoting family stability and supporting families in their role as nurturers and educators of children. Social support should include quality child care and working conditions that enable both parents to reconcile parenthood with working life.¹¹²

The protection of children in especially difficult circumstances is also required for an environment that fosters social development. Children who lack adequate family support, street children, abandoned children and many other categories of children must receive protection. The World Summit on Social Development provides that such children must receive psychological assistance for their reintegration into society and family reunification services must be provided.¹¹³ Youth living in poverty should be given opportunities to develop constructive social relations. The conditions of single parent families and female-headed households should receive the social support they require, including child-care support.¹¹⁴

This was also recognised in the *Copenhagen Declaration on Social Development*, which was adopted in 1995.¹¹⁵ The family is recognised as the basic unit of society, playing a key role in social development.¹¹⁶ The Declaration also states that attention should be given to the rights and responsibilities of families.¹¹⁷ Furthermore, the

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Adopted in 1996. This Charter is not binding but has influential value.

¹⁰⁹ Detrick op cit note 15, 308.

¹¹⁰ South Africa attended this summit and Nelson Mandela gave a speech at the opening. See <<http://www.anc.org.za/ancdocs/history/mandela/1995/sp950312.htm>>

¹¹¹ World Summit for Social Development *Action Plan* (1995) para 8.

¹¹² World Summit for Social Development *Action Plan* (1995) para 39(a)-(b).

¹¹³ World Summit for Social Development *Action Plan* (1995) para 39(e).

¹¹⁴ World Summit for Social Development *Action Plan* (1995) para 39(f)-(h).

¹¹⁵ This declaration was supported by South Africa. For a full list of participants, see: <<http://www.un.org/documents/ga/conf166/aconf166-9.htm>>.

¹¹⁶ Copenhagen Declaration on Social Development, 1995, para 80.

¹¹⁷ Ibid.

declaration recognises that various forms of families exist and that they should receive protection and support.¹¹⁸

The *World Summit for Children*, held in September 1990¹¹⁹ also affirms the importance of the family. It states that emphasis must be placed on responsible family planning and on child spacing. As a fundamental group and natural environment for the growth and well-being of children, the family should be given all necessary protection and assistance.¹²⁰ It further states that all children must be given the chance to find their identity and realise their worth in a safe and supportive environment, through families and other caregivers committed to their welfare.¹²¹ One of the commitments in the World Summit for Children is to work towards respect for the role of the family in providing for children and to support the efforts of parents, other caregivers and communities in nurturing and caring for children, from the earliest stages of childhood through to adolescence. The special needs of children separated from their families are also mentioned.¹²²

3.4 Conclusion

International law does not specifically refer to the right to 'social services'. The UNCRC and the related articles in the ACRWC however show that the rights to family or parental care are strongly linked to the right to be protected from abuse and neglect. It was argued in this chapter that the right to social services in the Constitution – and the other socio-economic rights for that matter – are to be interpreted in relation to these two rights. By strengthening the family, the abuse and neglect of children is prevented in the first place.

The South African Constitution also contains the right to a family environment and the right to be protected from abuse and neglect. The scope and content of the rights in international law can therefore be transferred to defining the rights in the Constitution. As the rights are both linked to social services, any service provisions discussed by authorities in relation to these articles should be taken into account when interpreting the right to social services in the Constitution.

The discussion about international law concluded that five layers of social services provision should exist to correspond to the rights they are aimed to give effect to. Firstly, social services should support parents and families in their child-rearing responsibilities, thereby preventing the need for more expensive and potentially more traumatising interventions later on. Secondly, children also have a right to appropriate alternative care if the original family environment cannot provide the necessary care and protection for the child. Thirdly, international law refers to other services which directly prevent abuse and neglect and protect children from further abuse and neglect. Fourthly, international law supports rehabilitative services once the first three layers of prevention have failed. Finally, services for children with special needs are required.

An analysis of the broader international law landscape reveals that the protection and strengthening of the family as the fundamental unit of society is reflected in a range of both binding and non-binding legal instruments. The UNCRC and the ACRWC are however the most explicit instruments as they focus on the situation when the

¹¹⁸ Copenhagen Declaration on Social Development, 1995, para 25(h).

¹¹⁹ South Africa was not present at this summit.

¹²⁰ World Summit for Children, para 14.

¹²¹ World Summit for Children, para 15.

¹²² World Summit for Children, commitment number 5.

strengthening of the family has failed and on additional considerations for children with special needs.

The layers of services are related to each other. Services that fall under the rehabilitative layer for example also have a preventative impact since they prevent the reoccurrence of the problems. The approach used in this paper should therefore be seen as complementary to the preventative approach, which considers the primary, secondary and tertiary preventative interventions to be different points of entry of service delivery. In other words, all the layers have a preventative function. The classification applied in this paper was used to group the legally sanctioned social service interventions linked to the rights in international and constitutional law. This should not be seen as exclusive since other professions such as social work have a far richer understanding of the interrelation of the different approaches, which should complement the layered categorisation of services from the legal perspective.

The discussion showed that the concept of a developmental social welfare system as outlined in Chapter 2 fits into the international law provisions. By strengthening the family environment and protecting children from abuse and neglect, the State benefits economically because fewer children will be directly dependent on state support. As long as the family is supported to care for and protect the child, the State doesn't have to. The child's requirements for optimum development are also easier met in the family environment than in state-run institutions. A child who has enjoyed full and harmonious development is more likely to become an independent and self-sufficient adult who actively contributes to the country's economy. The different layers of services identified therefore have a social and an economic development aspect. This corresponds directly with the discussion in Chapter 2 and shows that the right to social services can be interpreted within the context of developmental social welfare.

The next chapter will deal with the jurisprudence of the Courts. It will briefly analyse the constitutional provisions that are implicated in terms of the right to social services and thereafter will look at how the Courts have interpreted these provisions.

Chapter 4: The Constitution and the jurisprudence of the Courts

4.1 Introduction

This chapter deals with domestic law. The context within which the right to social services must be interpreted is described. As legal literature to guide an interpretation of the right to social services is scarce, the drafting process of the Constitution is used as a guide to define the scope and content of the right.

The discussion in this chapter focuses on how the South African Constitutional Court and High Courts have used the key terms such as 'social services' and 'welfare services' in cases that have come before them. The Courts have only had a few chances to deal with the issue of socio-economic rights and children's socio-economic rights specifically. To date, there has not been a Constitutional Court case dealing with children's right to social services. The past Constitutional Court cases on socio-economic rights can however give some insight into how the Court could approach socio-economic rights of children in general. This in turn can provide insight into how the courts would approach a case related to the specific right of children to social services.

In the following pages, three judgments will be analysed. The facts of each case, its judgment and the implications for the right to social services will be set out. The cases prove that the arguments made earlier in this paper are accepted in some or other way by the Courts. Firstly, it will be argued that the Courts' jurisprudence accepts that the Constitution mandates a strong involvement of the State in the welfare of its citizens. The days of the residual welfare system are therefore over. Secondly, the judgments will be used to reach some conclusions about the State's obligations towards children's socio-economic rights. The special position of the right to social services leads to a conclusion that this right is in fact a direct, unqualified right of children, thereby imposing direct obligations on the State. Finally, a case that signals how the special protection required by vulnerable groups can be effected through the Court system will be discussed.

4.2 Socio-economic rights in the Constitution

Before the jurisprudence of the Court is discussed, some preliminary remarks must be made about the unique and fascinating drafting process which gave birth to the final South African Constitution as we know it today. The drafting history was previously accepted by the Constitutional Court to provide useful insight into the meaning of rights in the Bill of Rights, especially as there was no other jurisprudence to provide such guidance.¹ The drafting history can therefore be used to reveal what the drafters of the Constitution intended to be the meaning of the right to social services.

4.2.1 The Travaux Préparatoires of the interim and final Constitution

The Constitution was drafted following a two-step approach. First an interim Constitution was drafted. This took place before a democratically elected authority was set up and therefore only contained those rights that were considered crucial for

¹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC). See also L Du Plessis 'The Genesis of the Chapter on Fundamental Rights in South Africa's Transitional Constitution' (1994) 9 SA *Public Law* 1-21, 1.

the transition to a democracy.² Socio-economic rights were not included because it was felt that they should be dealt with by a democratically elected authority.³

It must be noted, however, that children's socio-economic rights, particularly the right to social services, were already included in the interim Constitution. The drafters considered the rights of children – and more importantly the *socio-economic* rights of children – to be an issue of absolute priority for the new South Africa.⁴ It can be argued that the inclusion of children's rights in the interim Constitution spoke to a particular South African reality, namely that children were actively involved in the struggle against apartheid and, as a result, their rights were continuously violated and abused⁵. The drafters of the Constitution were probably influenced by a combination of the general damage that was caused by colonisation and the apartheid system on the lives of children, as well as by the brutal state reaction to children's active involvement in the events such as the June 1976 uprising and its aftermath in the following decade.⁶

It is also interesting that children's rights were accepted across the political spectrum by all the parties involved in negotiations.⁷ Children's rights, therefore, had a unifying force in showing that the protection of children in South Africa was a priority and common concern that united even largely divided political role-players.⁸ The rights of children and the urgent need to entrench those rights in the Constitution was therefore an issue on which there was common agreement.

When the children's rights clause was first tabled, it only granted children the right not to be subject to neglect, abuse or forced labour.⁹ Members of the Negotiating Council considered it absurd that two pages were devoted to the rights of criminals and only two lines to the rights of children.¹⁰ The National Children's Rights Committee (NCRC) was therefore asked how the children's rights clause could be expanded.¹¹ The NCRC made a number of recommendations and, as a result, the children's rights clause was expanded considerably, including by adding a number of socio-economic rights such as the right to social services, and the right not to be subjected to abuse and neglect.¹² The children's rights clause was based on the UNCRC. When deciding on what rights to include in the children's rights clause, the drafters specifically wanted the interpreter continuously to refer back to the UNCRC.¹³

² Ibid, 6. See also Technical Committee on Fundamental Rights During the Transition *Third Progress Report* (8 May 1993) 1 [unpublished on file with the Children's Institute].

³ Technical Committee *ibid*, 3.

⁴ J Sloth-Nielsen 'The Contribution of Children's Rights to the Reconstruction of Society: Some Implications of the Constitutionalisation of Children's Rights in South Africa' (1996) 4 *International Journal of Children's Rights* 323-344, 326.

⁵ H Corder 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491-533, 515.

⁶ Personal communication, J Loffel, 8 May 2006 [unpublished on file with the Children's Institute].

⁷ Sloth-Nielsen *op cit* note 4, 328.

⁸ *Ibid*, 326.

⁹ Technical Committee on Fundamental Rights *First Progress report* (14 May 1993) 4 [unpublished on file with the Children's Institute].

¹⁰ Technical Committee on Fundamental Rights *Sixth Report: Negotiating Council Meeting* (21 July 1993) no page numbers [unpublished on file with the Children's Institute].

¹¹ Technical Committee on Fundamental Rights *Tenth Progress Report* (5 October 1993) 19 [unpublished on file with the Children's Institute].

¹² *Ibid*.

¹³ Constitutional Assembly *Explanatory Memorandum: Draft Bill of Rights* (October 1995) 159.

The interim Constitution was adopted¹⁴ with a children's rights clause that is substantially the same as section 28 in the final Constitution.¹⁵ When the rights were up for discussion at the drafting tables of the final Constitution,¹⁶ some light was shed on the meaning of the right to social services. The Technical Committee stated that:

'[t]he right to basic social services is an important right for children. It implies the provision of social workers and other services necessary to the welfare of children. Such services should be provided to deal with children with family problems, neglected or abused children, children with physical and learning disabilities etc. Social services are based on social work and contribute to the welfare and development of both individual and groups in the community.'¹⁷

This explanation suits the definition of social services that is put forward in this paper although it doesn't reflect the way in which the terms are being used today. It recognises that 'social services' are delivered by social workers and other people who work towards the welfare of the child. 'Welfare' in this context, as in this paper, connotes a state of well-being. The Theme Committee distinguished between social services and social security because social services are based on social work and contribute to the welfare and development of both individual and groups in the community.¹⁸ It is therefore clear that the drafters of the Constitution did not see 'social services' as the over-arching term covering social security and other services and programmes. In this context 'social services' definitely seem to run parallel to social security interventions in terms of the welfare system as a whole. Note that the welfare of the individual as well as the community is addressed in this definition. This means that developmental services that strengthen the community as well as the individual are definitely covered by children's right to social services.

The Theme Committee also said that children should be entitled to certain basic socio-economic rights – such as the right to social services – because of their

¹⁴ The interim Constitution was adopted and ratified by the MPNP on 18 November 1999 in the early hours of the morning. See <<http://www.constitutionalcourt.org.za>>.

¹⁵ There were a few differences. Section 30 of the Interim Constitution contains the right to parental care only (s 30(1)(b)), whereas the final Constitution talks about the right to family care or parental care or to appropriate alternative care when removed from the family environment (section 28(1)(b)). Secondly, the interim Constitution contains the right to security (s 30(1)(c)) which was not included in the final Constitution, probably because it overlapped with the right to freedom and security of the person, found in section 12. The clause protecting children from neglect and abuse (section 30(1)(d)) was also considerably expanded, including the right to be protected from maltreatment and degradation in addition to abuse and neglect (s 28(1)(c)).

¹⁶ One submission should be pointed out in this context. Jackie Loffell, talking about social security provisions, explained that the child's right to survival and development requires strengthening the family as the primary context where the child should be nurtured and cared for. Diverse family forms were to receive protection. This was argued to be in line with the UNCRC – which is true according to the third chapter of this paper. The international community accepts that the family is the environment best suited to ensure that the child's physical, emotional and social needs are met. The integrity of the family therefore needed to be protected to allow children to grow and develop. It was argued that high rates of family breakdown were inevitably accompanied by a proliferation of social ills, such as mental illness, child neglect and abuse, addictions, crime and violence. If the family failed to meet the basic needs, the State would have to make efforts to ensure that they are helped to overcome their problems. J Loffell writing for the NCRC 'The Right to Social Security and the Right to Family Life' (13 May 1995) 1 [unpublished on file with the Children's Institute].

¹⁷ Theme Committee 4 *Supplementary Memorandum on the Bill of Rights and Party Submissions* (undated) 2.5 [unpublished on file with the Children's Institute].

¹⁸ Theme Committee 4 *Supplementary Memorandum on the Bill of Rights and Party Submissions* (undated) 2.6 [unpublished on file with the Children's Institute].

vulnerability. The Theme Committee distinguished between the socio-economic rights of children and those that applied to everyone, as the State had to take immediate steps to secure the socio-economic rights of children as they were not subject to progressive realisation.¹⁹

A number of socio-economic rights in the final Constitution applicable to everyone, including children, show that the drafters envisaged a strong involvement of the State in the welfare of its people. The Constitution thereby aligns itself with the notion of both the institutional and the developmental approaches recognised in international law (see Chapter 3) and to some extent in the *White Paper for Social Welfare* (see Chapter 2).

The socio-economic rights in sections 26 and 27 of the Constitution were drafted as rights of 'access to' rather than as direct rights. Essentially, the Theme Committee that dealt with fundamental rights felt that the term 'access to' would be useful to dispel a common misconception that the inclusion of socio-economic rights requires the State to hand out socio-economic benefits to everyone who wants them. In fact the rights could be realised in a number of ways, such as to relegate delivery to the market, or through a combination of public and private mechanisms.

Essentially, the aim was to improve access to these rights and this could be done through a variety of regulatory, educational and social measures without necessarily allocating an increased budget for direct public delivery.²⁰ It was therefore decided that the socio-economic rights in the Constitution would be rights of 'access to' rather than direct rights. The formulation of these rights was based on the ICESCR.²¹ Essentially, resources were scarce, making a promise of direct delivery of benefits unrealistic. In terms of welfare approaches, social development had to be coupled with economic development.

From the discussion of the welfare models earlier it is clear that the best approach to social welfare, and which runs parallel to economic development, is the developmental approach. At the same time services to children that fall under the institutional approach can only be good for the country's economic development. The challenge in South Africa is therefore to find the appropriate balance between the two approaches since they can co-exist in terms of the Constitution and international law. A combination of the two approaches would also be in the best interests of children if the State can keep the system affordable and services available across the country without discriminating against anyone.

4.2.2 Rights guaranteed

The final Constitution contained a number of broad socio-economic rights. Section 26 states that:

- '(1) [e]veryone the right to have access to adequate housing.
- (2) The State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of this right.'
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

¹⁹ Ibid.

²⁰ H Ebrahim 'Memorandum from Technical Committee 4 on Section 25 and 26 of the "Working Draft"' (1996) 3 [unpublished on file with the Children's Institute].

²¹ H Ebrahim 'Draft Bill of Rights' (1996) 9 [unpublished on file with the Children's Institute].

Section 27 states that:

- '(1) [e]veryone has the right to have access to-
- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.'
- (3) No one may be refused emergency medical treatment.'

The final child rights clause looks like this:

- (1) 'Every child had the right-
- [...]
- (b) to family care or parental care or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation; [...]

4.3 South African jurisprudence

This section will look at the three cases that have so far shaped the interpretation of socio-economic rights in the Constitution. There are other cases that could be discussed under this section²² but the discussion has been limited to those cases that have possible implications for the right to social services.

4.3.1 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC)²³

The *Grootboom* case is the first seminal socio-economic rights case that came before the Constitutional Court. The only case dealing with socio-economic rights before the *Grootboom* case was the case of *Soobramoney*²⁴. *Grootboom* is well known as one of the most important cases dealing with the socio-economic right to housing. It was made exceptionally clear in this case that the Constitution mandates the protection of the most vulnerable members of society.

Facts of the case

The case began when a community approached the High Court for urgent relief related to housing and shelter. The community lived in an informal settlement in an area that was severely overcrowded and prone to flooding. They lived under deplorable conditions and when the winter rains set in, the conditions at the settlement became unbearable. The respondents therefore erected shacks on nearby vacant land that had better drainage. Unfortunately, the land was privately owned. In due course, the members of the community were evicted by the State in a very hostile and destructive manner. Their shacks were bulldozed and their property burnt. To make matters worse, the eviction occurred a day earlier than planned, which meant that people did not have a chance to salvage basic belongings such as

²² For example, *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC); *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

²³ This case will be referred to as the *Grootboom* case hereafter.

²⁴ *Soobramoney* op cit note 22.

clothes, furniture and building materials.²⁵ Their former sites at the settlement where they had originally stayed were by this time filled by other shack dwellers. The members of the community therefore found themselves homeless with nowhere else to go.²⁶

The community approached the High Court in 1999. They made an urgent application, seeking an order directing the respondents to provide temporary and adequate shelter and/or housing and/or land, pending the applicants and their children obtaining permanent housing. Half of the applicants were children. The applicants also sought an order directing the respondents to provide their children with sufficient basic nutrition, shelter, health care and social services.²⁷

Josman AJ presided over the urgent application that was made to the High Court. He performed inspection *in loco*, and ordered the respondents to provide shelter to those applicants who were caring for children in the Wallacedene Community Hall, temporarily and free of charge.²⁸ As this was an urgent application the court did not provide any reasons for the judgment. The words 'in order to provide temporary accommodation to the various children' used in the order however indicated that this order was intended to give effect to the rights of children under section 28 of the Constitution.²⁹ The order was also only an interim one. On the return date the matter came before judges Davis and Comrie in the High Court. This judgment is discussed below.

The High Court judgment

The community based their claim on section 26 (dealing with the right of everyone of access to adequate housing) and section 28 (dealing with the right of children to shelter).³⁰ Judge Davis did not find a violation of the rights of access to housing in section 26(1) and (2) because the section does not create an immediate right. The right is realised progressively. Davis J did however find a violation of section 28(1)(c) – children's right to shelter.

The High Court accordingly ordered the government to provide the families in the community who are caring for children with adequate shelter and basic sanitation.³¹ The High Court stated that the primary duty to provide children with shelter rests with the parents. If parents are not able to do so, this obligation reverts to the State.³² The court acknowledged that 'shelter' is a more rudimentary form of housing compared to 'housing'.³³ The provision of shelter should enable the parents to live with the child, not because the parents become the bearers of the right but rather because it is in the child's best interest to remain with the parents.³⁴ The court specifically pointed out that this does not mean that the parents become the bearers of the constitutional right to shelter. The order must therefore enforce a child's right to shelter and take into account the child's need to be accompanied by his or her

²⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), at para 33.

²⁶ K Pillay 'Implementation of Grootboom: Implications for the Enforcement of Socio-economic Rights' in *Law, Democracy and Development* (2002) 6 255-277, 260.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

³¹ *Ibid.*, 26.

³² *Ibid.*, 16.

³³ *Ibid.*, 19.

³⁴ *Ibid.*, 17.

parents.³⁵ It was argued that this is in line with the purport of the Constitution as a whole.³⁶

The Court points out that any other interpretation of the right to shelter would mean the break-up of the family. It is a situation that the Constitution is determined to prevent.³⁷ This is important for our discussion, as the High Court recognised that it is in the best interest of children to remain with their parents.³⁸ It is also important because it signals that the Court approached the issue from the perspective of the rights of children and not of adults. This is an important feature of the High Court judgment, which, unfortunately, is lacking in the Constitutional Court judgment. However, the High Court judgment reasoning leaves destitute people who don't have children without any recourse.

The Court points to the difference in the drafting style of the sections dealing with children's rights, section 28 and the corresponding right of everyone to adequate housing in section 26(1). Section 28(1)(c) was drafted as an unqualified constitutional right.³⁹ The Court therefore concluded that budgetary constraints did not apply in determining the rights in section 28(1)(c).⁴⁰

It is interesting to note that the Court recognises the importance of the family in the constitutional context. It quotes the United Nations Guidelines of the Prevention of Juvenile Delinquency:

'Since the family is the central unit responsible for the primary socialisation of children, governmental and social efforts to preserve the integrity of the family, including the extended family should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well being of children.'⁴¹

The right of children to family care,⁴² to shelter and the best interests of the child principle⁴³ were interpreted together to mean that children should be housed with their parents. The Court made a declaratory order in terms of which the applicants were to receive shelter through the unqualified right of children to shelter.⁴⁴

The Constitutional Court judgment

The State appealed against this decision to the Constitutional Court.⁴⁵ The Constitutional Court's judgment was based on sections 26(1), 26(2) and 28(1)(c). The main thrust of the judgment, however, concerned section 26. The Court used the 'reasonableness standard' to determine if the action taken by the State was constitutional. This concept takes into account the following factors: the programme must be reasonable in conception and implementation; it must be balanced and flexible; it must pay attention to crisis situations; it must deal with long-, medium- and

³⁵ *Ibid*, 19.

³⁶ *Ibid*.

³⁷ *Ibid*, 291.

³⁸ *Ibid*, 23.

³⁹ *Ibid*, 21.

⁴⁰ *Ibid*, 22.

⁴¹ *Ibid*, 18.

⁴² Section 28(1)(b).

⁴³ Section 28(2).

⁴⁴ *Grootboom* op cit note 30, 26.

⁴⁵ *Grootboom* op cit note 25. See also generally Pillay op cit note 26, 277.

short-term needs; and it must not exclude a significant segment of society.⁴⁶ Finally, the programme must prioritise the needs of those who are most desperate.⁴⁷ The Court found that the State's housing programme was unreasonable because it did not make provision for people who were in crisis and ordered the State to amend its housing policy to provide for these people.⁴⁸

The Constitutional Court made some important statements which are relevant to this discussion here. From the outset, the Court stated that the people of South Africa are committed to the attainment of social justice and the improvement of the standard of living.⁴⁹ The Court also said that all the rights in the Constitution must be read as being inextricably linked to one another. Realisation of socio-economic rights is therefore linked to the enjoyment of dignity and equality.⁵⁰

The Constitutional Court stated that the distinction between the right to shelter and the right of access to housing is a superficial one, because housing is a form of shelter, be it rudimentary or not.⁵¹ The Court said that the rights in the Bill of Rights must be interpreted in light of the international law obligations binding on South Africa.⁵² In relation to the rights of children, this would include the UNCRC. Section 28 of the Constitution, the Court said, is one way in which these obligations are honoured.

The Court went on to say that the State ensures the protection of children in the first place by legally compelling parents to take care of their children. Legislation and common law therefore impose obligations on parents to care for their children. These obligations are reinforced through civil and criminal law as well as through 'social welfare programmes'.⁵³ As with children who are being cared for by their parents, the State must therefore create mechanisms for the maintenance of children and their protection from maltreatment, abuse, neglect or degradations and other forms of abuse.⁵⁴ In addition, the State must provide families with access to land, access to housing, health care, food, water and social security.⁵⁵

The Constitutional Court overturned the decision made by the High Court. The High Court decision was very child-friendly because it ruled that children are entitled to be provided with shelter by the appropriate organ or department of State. The parents of the applicant children were entitled to be accommodated with their children until such time that the parents were able to provide the children with shelter.⁵⁶

Unlike the High Court, the Constitutional Court order did not approach the matter from a children's rights perspective. The applicants were therefore granted no immediate relief in the main judgment of the Constitutional Court.⁵⁷ Their only

⁴⁶ Ibid, 44.

⁴⁷ Ibid, 44.

⁴⁸ Ibid, 66, 99.

⁴⁹ *Grootboom* op cit note 25, 1.

⁵⁰ Ibid, 25.

⁵¹ Ibid, 73.

⁵² Ibid, 75.

⁵³ Ibid, 75.

⁵⁴ Ibid, 78.

⁵⁵ Ibid, 78.

⁵⁶ *Grootboom* op cit note 30, 26-27.

⁵⁷ The immediate relief of the crisis situation that the community was experiencing was dealt with a settlement that was reached before the case went to the Constitutional Court. In terms of the settlement it was agreed that the community will be provided with tents and basic sanitation. The agreement was, however, not honoured by the government. After the

consolation is that the government was ordered to take the needs of people that were in absolute crisis into consideration.

The *amici*, relying on the ICESCR, raised the issue of a minimum core right of access to adequate housing.⁵⁸ The notion of a minimum core was rejected by the Court.⁵⁹ The Court felt that it was impossible to find out what the minimum core requirements were, mainly because the needs of people were too diverse.⁶⁰ The issue of a minimum core will be dealt when discussing the next case. The relevance of the rejection of the minimum core by the Court is illustrated when the two cases are compared.

Implications for children's right to social services

A number of interesting conclusions can be derived from this case. Firstly, it is interesting to note that the Court considered 'social welfare programmes' to be one way of ensuring that parents care for their children. The Court specifically stated that, in relation to children who are being cared for by their parents or families:

[t]he State is required to [...] provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to healthcare, food, water and social security in terms of section 27 [...] One of the ways in which the State would meet its section 27 obligation would be through a *social welfare programme* providing maintenance grants and other *material assistance* to families in need in defined circumstances.⁶¹
[Own emphasis added]

One can therefore conclude that social security and other material assistance mentioned in section 27 in the Constitution, namely health care, sufficient food and water, are termed 'social welfare programmes' by the Court. This shows that the narrow definition given to 'welfare services' by the government and its officials is not in sync with the way in which the Constitutional Court interprets these phrases. This paper suggests that the Constitutional Court definition should be preferred because it is the only definition that informs the meaning of children's right to social welfare in the context of all the other socio-economic rights in the Constitution where the definitions don't overlap with each other.

Based on the Constitution, the Court's understanding of the welfare system also indicates that the State is obliged to provide a range of programmes and to take active steps to promote the welfare of its people. While the days of the residual model should theoretically be over, in reality the welfare system still resembles much of the residual model that was in place before this legal duty was placed on the State.

The second conclusion from the judgment relates to the importance that international law attaches to the family. Both the High Court and the Constitutional Court recognised that it is in the best interests of children to be in the family environment. The best interests standard, according to Court, provided a benchmark against which

community approached the Court, it made an order separate to the main judgment discussed here, which enforced the settlement as an order of the Court. It is unfortunate that the settlement took place outside the main judgment because it is not well known and has not influenced the resulted jurisprudence.

⁵⁸ Grootboom op cit note 25, 27.

⁵⁹ Ibid, 33.

⁶⁰ Ibid, 33.

⁶¹ Ibid, 78.

all proceedings and decisions relating to children could be tested.⁶² Although the best interests standard has to be interpreted when considering the facts of each case, in this case it was found that the best interests of the child required children to be sheltered with their parents.⁶³ This shows that the importance attached to the family in international law is reflected in the national jurisprudence. Debates on the developmental and institutional social welfare systems also emphasised the need to strengthen and protect the family. This also shows that the South African jurisprudence is in line with the developmental or institutional social welfare approach – at least in relation to the welfare services provided to children. The social services discussed in Chapter 3 are therefore relevant to the South African context.

It is interesting to note that section 28 was cited as one of the mechanisms through which South Africa honours its international law obligations in relation to the rights of children as contained in the UNCRC. The drafters of the Constitution relied heavily on the UNCRC when drafting the children's rights clause. The Constitutional Court recognised in the *Grootboom* judgment that the role of section 28 is to nationalise the international law obligations found in the UNCRC. This statement confirms that strong reliance can be placed on the UNCRC in interpreting section 28.

The third observation relates to the fact that the primary obligation to provide the entitlements in section 28(1)(c) lies with the parents. Only if the parents cannot, or will not, provide for their children will that obligation fall on the State. The Court accordingly said that the socio-economic rights of children found in section 28(1)(c) must be read together with the right to family care, parental care and appropriate alternative care (section 28(1)(b)).⁶⁴ The Court concluded that the State incurs a direct obligation towards the socio-economic needs of children who are removed from the family environment.⁶⁵ The Court however stated that this does not mean that the State incurs no obligations towards children who live in a family environment. The State must still ensure that children are afforded the protection contemplated in section 28. The Court stated that:

'[t]his obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of the children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28.'⁶⁶

This leads to the conclusion that the right to family care, parental care and appropriate alternative care in the Constitution is also directly linked to the right to be protected from abuse, neglect and degradation. The right to family and parental care is, however, also linked to the socio-economic rights granted to children in section 28(1)(c). The implication of this is that the rights to parental care, family care, appropriate alternative care and the right to be protected from abuse, neglect and degradation are all linked to the socio-economic rights of children, in particular the right to social services.

The right to family care, parental care and appropriate alternative care under international law was in Chapter 3 thematically linked to the right to be protected from abuse, neglect and degradation. All the specific services drawn from international law were identified on the basis of this connection. International law requires that the

⁶² *Grootboom* op cit note 30, 17.

⁶³ *Ibid*, 19.

⁶⁴ *Grootboom* op cit note 25, 76.

⁶⁵ *Ibid*, 77.

⁶⁶ *Ibid*, 78.

child is protected by supporting and assisting the parents and the family of the child. This case confirms that the services deduced from the inter-relationships of the rights are relevant to the domestic law of South Africa.

4.3.2 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)

The next landmark case on socio-economic rights was brought by the Treatment Action Campaign (TAC). The case challenged the constitutionality of the government's programme to address the Mother-to-Child Transmission (MTCT) of HIV. HIV/AIDS has reached pandemic proportions in South Africa. At the time of this case, it was estimated that approximately 4.86 million people, or 10% of the entire population, were HIV positive.⁶⁷

HIV can be passed on from mother to child before or during birth, as well as after birth through breast milk. Anti-retroviral drugs, such as Nevirapine, can prevent the MTCT of the disease.⁶⁸ HIV transmitted from the mother to the child is the leading cause of death of children under five years of age.⁶⁹

Facts of the case

The State, through the Department of Health, decided to make the drug Nevirapine available for the prevention of the MTCT of HIV at a limited number of pilot sites throughout the country. There were two pilot sites per province. These pilot sites would effectively serve only 10% of the population that needed the intervention.⁷⁰

The TAC made an application to the High Court, seeking a declaratory order requiring the respondents to make Nevirapine available to all pregnant, HIV-positive women who gave birth in public hospitals, where it was medically indicated. The applicants also asked for an order directing the respondents to make such treatment available. The applicants also wanted an order compelling the respondents to produce and implement an effective national programme to prevent and reduce the MTCT of HIV; to provide voluntary counselling; and, where appropriate, Nevirapine or other medicine as well as formula milk for feeding.⁷¹ The requested orders were granted in the High Court. However, the High Court judgment will not be discussed any further because it does not add much to the debate here.

The Constitutional Court judgment

The Minister of Health appealed against the High Court decision to the Constitutional Court, which considered two principal issues. Firstly, the Court had to decide if the respondents were entitled to refuse to make a registered drug like Nevirapine available to HIV-positive pregnant women to reduce the risk of MTCT, when in the judgment of a medical practitioner, this was the right course of action. The second issue raises the question of whether the respondents are obliged by law to implement

⁶⁷ *Treatment Action Campaign and Others v Minister of Health and Others* Transvaal Provincial Division case number 21182/ 2001, 3.

⁶⁸ *Ibid*, 3.

⁶⁹ D Bradshaw, N Nannan, R Lauscher, P Groenewald, J Joubert, B Nojilana, R Norman D Pieterse & M Schneider (2004) 'South Africa National Burden of Disease Study 2000: Estimates of Provincial Mortality' in M Jacobs, M Shung-King, C Smith (eds) *South African Child Gauge 2005* (2005), 9.

⁷⁰ TAC op cit note 67 5.

⁷¹ *Ibid*, 2.

and set out clear timeframes for a national programme to prevent MTCT, including voluntary counselling and testing, anti-retroviral therapy, and the option of using formula milk for feeding.⁷²

The Constitutional Court specifically dealt with the rights of children. The Court reiterated the findings in *Grootboom* and stated that the primary obligation to provide basic health care services for the child rests with the parents who can afford to pay for such services.⁷³ Quoting the *Grootboom* judgment, the Court stated that '[t]his does not mean [...] that the State incurs no obligations in relation to children who are being cared for by their parents or families'.⁷⁴

Thus, the Court confirmed that the State is obliged to ensure that children are accorded the protection detailed in section 28 of the Constitution when the implementation of the right to parental or family care is lacking.⁷⁵ The Court recognised that this case concerned children born in public hospitals and clinics to mothers who were unable to gain access to private medical treatment because it is beyond their financial means. The mothers and their children, the Court stated, were therefore dependent on the State to make such health care services available to them.⁷⁶ The Constitutional Court upheld the finding of the High Court that the policy was unreasonable and therefore unconstitutional. The policy of confining the drug to research and training sites failed to address the needs of mothers and their newborn babies who did not have access to these sites.⁷⁷ The Court concluded that:

'[g]overnment policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of Nevirapine at the time of the birth of the child. A potentially lifesaving drug was on offer and where testing and counselling facilities were available, it could have been administered within the available resources of the state without any known harm to mother or child.'⁷⁸

It is interesting to note that even though the Constitutional Court dealt with the rights of children, the unreasonableness of the programme was dealt with under section 27(2) of the Constitution.⁷⁹ The fact that the rights of children were affected by the policy was an added factor that led to the programme being found unreasonable.

The State was ordered to remove the restrictions on the dispensing of the drug at public hospitals immediately. The State was also ordered to make provisions for counsellors based at these hospitals to provide counselling on the use of Nevirapine.⁸⁰ Furthermore, the State was ordered to take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of MTCT of HIV.⁸¹

⁷² *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC), 18.

⁷³ *Ibid*, 77.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*, 79.

⁷⁶ *Ibid*, 79.

⁷⁷ *Ibid*, 67.

⁷⁸ *Ibid*, 80.

⁷⁹ *Ibid*, 80-81.

⁸⁰ *Ibid*, 135.

⁸¹ *Ibid*, 135.

Implications for children's right to social services

The Court cleared up some common misunderstandings from the *Grootboom* case. It made it very clear that the State does incur some obligations towards children when they are still in the family environment. Unfortunately, the Court did not elaborate on what these obligations are. This raises the question: is the child receiving the protection stipulated in section 28? If the parents of a child are unable or unwilling to provide that protection, the State has an obligation to provide that protection to the child.

The second issue that the Court considered is a bit more complicated. The *amici* to the proceedings argued that section 26 and section 27 of the Constitution construed two positive obligations on the State. The one obligation was to give effect to the core rights contained in section 26(1) and 27(1), and the other is to give effect to the full right progressively through 'reasonable legislative and other measures, within the available resources'.⁸² The Court did not accept this argument, which supported the notion of a minimum core because it held that sections 27(1) and 27(2) had to be read together to understand the positive obligation on the State.⁸³

In the *Grootboom* case, the *amici*, in arguing for the minimum core, put forward that the right to shelter of children in section 28 was a specific manifestation of the right to housing in section 26. They argued that everyone has a minimum core right to housing in terms of section 26 and the international law relevant to that section. Children's minimum core right to shelter is, however, stated beyond doubt in section 28.⁸⁴ Responding to this, the Court said that the obligation created by section 28 towards children can only be ascertained in the context of the rights and obligations in section 26, which grants everyone the right of access to adequate housing. The rights in section 26 clearly overlap with the rights in section 28, because section 26 confers rights onto everyone including children, whereas section 28 confers rights to children alone. This overlap was held to be inconsistent with the notion that section 28(1)(c) creates separate and independent rights for children and their parents.⁸⁵ In terms of this reasoning, children do not have a separate right to shelter with their parents as the High Court had argued in the *Grootboom* case.

These arguments are significant for this paper: If the rights of children to basic nutrition, shelter and basic health care services⁸⁶ must be defined in light of the rights to access to sufficient food and water,⁸⁷ adequate housing⁸⁸ and health care services applicable to everyone, then it leaves a gap for the right to social services. There is effectively no right that applies to everyone that 'corresponds' with the right of children to social services. The right to social security in section 27(1)(c) cannot be the corresponding right because that right already includes the right to social assistance for dependants, presumably including children. If that was meant to be the corresponding right to social services, then surely the same terminology would have applied?

What this means is that the arguments made by the Court to dispel the notion of separate and independent rights for children does not apply in the case of the right to

⁸² *Ibid*, 29.

⁸³ *Ibid*, 39.

⁸⁴ Heads of Argument on Behalf of the *Amici Curiae* Community Law Centre and Human Rights Commission in the *Grootboom* matter, para 35-36.

⁸⁵ *Grootboom* op cit note 25, 75.

⁸⁶ Section 28(1)(c).

⁸⁷ Section 27(1)(b).

⁸⁸ Section 26(1).

social services. It means that the limitation of progressive realisation within the available resources attached to the rights in section 26 and 27, and which were imported by the Court to apply to the socio-economic rights of children, does also not apply to the right to social services. This interpretation would mean that the right to social services is restricted only by the limitation clause⁸⁹ and is not subject to the notion of progressive realisation. This would also be supported by the fact that the right to social services reinforces the rights to family care, parental care or appropriate alternative care and the right to be protected from abuse, neglect and degradation, both of which are arguably not only socio-economic rights.

In summary, this case firstly confirmed that the State in fact has direct obligations to children when they are living in the family environment. The State must therefore step in when the parents cannot provide the protection set out in section 28 to their children. The analysis of this case regarding the relationship of section 28 and section 26 can also be used to argue that the right to social services is a separate and independent right of children that is free of the limitations applying to the other socio-economic rights.

4.3.3 *Centre for Child Law & Another v Minister of Home Affairs and Others* Case No: 22866/ 04⁹⁰

While not very well known yet, this case was a victory for child rights activists. It is arguably the first time that a Court comprehensively used the international and national law on children's rights. This judgment shows that the Courts have an important role to play in protecting children, especially vulnerable children like the refugee children in this case. Unlike the other cases, this case never went to the Constitutional Court on appeal.

Facts of the case

This case was brought by the Centre for Child Law based at the University of Pretoria. The Centre brought an urgent application on behalf of a number of unaccompanied foreign children who were detained at Lindela, which is also called Busasa. Lindela, which means 'place of waiting', is a repatriation centre where illegal immigrants are detained until they are deported to their countries. At the time of the main application, the children were detained with adults. They were living under horrendous conditions at the centre. When children were deported from Lindela, they were loaded onto trucks and taken to the train station. At the station, they were put on a train which took them to the country's border. At the border they were loaded onto another truck and taken to the nearest police station in their country.⁹¹ Effectively, there were no protective measures to ensure that these children did not suffer any kind of abuse while being deported. There was also no way of ensuring that the children received a proper reception in their country of origin to ensure that they are protected from maltreatment once they had returned home.

An interim interdict was granted by the court, preventing the Minister of Home Affairs, the Director-General of Home Affairs and the Busasa/Lindela Centre from proceeding with the deportation of the children. A *curator ad litem* was also appointed for the children. This *curator* was given the powers to investigate the conditions of the children and to make recommendations to the Court regarding the future treatment of

⁸⁹ Section 36.

⁹⁰ From now on this case will be referred to as the *Centre for Child Law* case.

⁹¹ *Ibid*, 5.

the children. The *curator* also had the right to institute legal proceedings to enforce the rights of the children.

The report by the *curator* recommended that the children be moved from Lindela to a place of safety, such as Dyambo, until a Children's Court inquiry had been conducted for each child in terms of the Child Care Act.⁹² The report also recommended that the international social services, based in the Department of Social Development, should assist the *curator* with gathering information on the family of each child for the Children's Court inquiries.

The children were moved to a place of safety on 2 April 2004. The Commissioner of the Children's Court in the Krugersdorp district unfortunately refused to conduct the inquiries for these children because he believed that the Child Care Act did not cover foreign children. The Commissioner was later compelled by an application made by the *curator* to conduct the inquiries. After that application was granted, the Department of Social Development took no further steps to bring the children before the Children's Court. By the time the High Court was approached, the children had been in detention for seven months and their state of mind was said to have deteriorated. Incidences of attempted escape, threats of suicide and stabbing made it imperative that the Children's Court inquiries happened quickly.⁹³

An application was brought to the High Court regarding the failure of the Department of Social Development to bring the 123 unaccompanied foreign children before the Children's Court and the failure of the respondents to reply, or even comment, on the curator's report or any correspondence filed by the applicants.⁹⁴ The Court recognised that only 13 of the original group of children were still at the place of safety and that more and more children were constantly being admitted to Lindela.⁹⁵ Considering the lack of resources and the lack of access to legal representation, this situation was of great concern to the judge.

The High Court judgment

The judge cited the law that is applicable in this case. Firstly, the judge recognised that all persons within the territory of the Republic of South Africa have the protection of the Court and the Constitution.⁹⁶ Secondly, the Court set out section 28 and recognised the principle of the best interests of the child in section 28(2). In relation to socio-economic rights applicable to everyone, the Court recognised the negative duty of the State and private parties to desist from preventing or impairing the right of access to socio-economic rights. Children's rights are, however, unlimited in terms of the right to 'access to' or the other qualifications found in section 26 or 27.⁹⁷

The Court acknowledged the previous jurisprudence that set out the primary obligation of the parents to provide for the socio-economic needs of their children. The Court accepted the argument that the State has a direct duty to ensure that the basic socio-economic rights of children are provided for when the child lacks the family or parental care. The unaccompanied foreign minors were such children.

⁹² Child Care Act 74 of 1983.

⁹³ *Center for Child Law* op cit note 90 para 2-10.

⁹⁴ *Ibid*, 129 (1-3).

⁹⁵ *Ibid*, 14.

⁹⁶ *Ibid*, 15.

⁹⁷ *Ibid*, 17.

The Court therefore accepted that the State has a duty to provide for the basic socio-economic needs of these children.⁹⁸

The Court went on to cite the provisions of the Child Care Act that stipulate that a child who is without visible means of support must be brought before a Children's Court to determine if the child is in need of care and protection and whether the child needs to be moved to a place of safety.⁹⁹ The Child Care Act also states that such a child may be removed to a place of safety by a policeman, social worker, or another authorised officer.¹⁰⁰

The Court stated that there is no doubt that the respondents' conduct seriously infringed on the children's fundamental rights contained in the Constitution and the Child Care Act. The fact that more and more children were being brought to Lindela was also a breach of the Constitution and statutory rights and should cease immediately. The judge stated that the way in which the children were deported was not only unlawful – it was also shameful.¹⁰¹ The way in which the children were dealt with was also found to be out of line with the policies of the Department of Home Affairs.

Considering these serious infringements, the Court stated that all unaccompanied foreign children who find themselves in South Africa illegally should have legal representation appointed to them by the State. Citing the Constitution and the international legal instruments and ideals that South Africa committed itself to, the judge stated that:

'these lofty ideals become hypocritical nonsense if those policies and sentiments are not translated into action by those who are put in positions of power by the state to do exactly that; who are paid to execute the admirable laws and yet, because of apathy and lack of compassion, fail to do so.'¹⁰²

The judge said the respondents (various national and provincial government departments) had a duty to liaise with each other and to find solutions together. They were ordered to work out a detailed, practical arrangement to ensure that unaccompanied foreign children are dealt with in accordance with the rights and principles set out above.¹⁰³ The respondents were directed to conduct and finalise Children's Court inquiries in accordance with the provisions of the Child Care Act. The Minister and the Director-General of Home Affairs and the Busasa/ Lindela Centre were ordered to compile a list of all the children in the Centre, detailing their ages and countries of origin, to remove the children to a place of safety and to bring them before the Children's Court.¹⁰⁴ The Commissioner of Child Welfare was also ordered to assign a legal practitioner to all the children held in the place of safety.¹⁰⁵

Implications for children's right to social services

The biggest implication of this case is that it confirmed the direct and unlimited obligation of the State to provide for the socio-economic needs of children who do not have parental or family care. It could open the door to further arguments dealing with

⁹⁸ Ibid, 17.

⁹⁹ Ibid, 19-20.

¹⁰⁰ Ibid, 20-21.

¹⁰¹ Ibid, 23.

¹⁰² Ibid, 30.

¹⁰³ Ibid, 31(1).

¹⁰⁴ Ibid, 31(5).

¹⁰⁵ Ibid, 31(9).

children who are in family care but whose family is unable to provide for their socio-economic needs.

The second implication is that this judgment highlighted the need to take extra measures of protection for children who are especially vulnerable. All children who do not have family or parental care are part of such a vulnerable group. Children living and or working on the streets, or unaccompanied foreign minors, would also be part of such a vulnerable group. The UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child have identified other groups of children that are considered to be vulnerable and equally deserving of special protection and assistance, for example, children with disabilities.¹⁰⁶

This case is also relevant to the present discussion because it was the first time that the State was actually ordered to provide immediate social services to the unaccompanied foreign children. The international social services unit based in the Department of Social Development was ordered to assist with gathering information on the children's families.¹⁰⁷ The initiation of Children's Court inquiries is also significant because these inquiries can order a range of further social services that children in particular circumstances may need. Finally, the fact that the Departments of Social Services and Home Affairs were ordered to work together signals that inter-departmental collaboration is crucial for dealing with vulnerable groups such as children.

Overall, this judgment is commendable. It actively enforced the best interest of the child. The judgment could pave the way for a more protective and creative jurisprudence on dealing with the neglect, abuse and degradation of children. This judgment also shows that the right to protection from abuse and neglect and the right to social services are inextricably linked to each other.

4.4 Conclusion

This chapter showed that the drafters of the Constitution intended the welfare system to be one that grants a wide variety of services and programmes to the people of South Africa. The Constitution therefore contains a variety of rights of access to broad welfare services such as housing and health care. Social services are aimed at the welfare of the individual and the community as a whole. In relation to children, social services are intended to deal with children with family problems and who are abused and neglected. In relation to children, it also contains the right to family care, parental care and appropriate alternative care. The right to be protected from abuse, neglect and degradation is also included. This is the framework in which the right to social services must be interpreted.

The Constitutional Court has confirmed that parents are primarily responsible for providing care and protection for their children. This is encapsulated in section 28 of the Constitution. If parents are unable to provide the child with care and protection, or if the child does not live in a family environment, it is the duty of the State to provide care and protection to the child.

The Courts have not elaborated on the direct obligations towards children who live in a family environment but whose family is unable to provide for their socio-economic

¹⁰⁶ G v Bueren 'Alleviating Poverty Through the Constitutional Court' (1999) 15 SAJHR 52-74, 56.

¹⁰⁷ *Centre for Child Law* op cit note 88, 4.

needs. The reason for this is partly that the Courts have shied away from giving a full interpretation to the socio-economic rights of children.

This has very particular implications for the right to social services. Children's socio-economic rights have in the past been defined as part and parcel of the corresponding adult rights – both the right of access to adequate housing and the right of access to health care. The Court has not imposed an obligation on the State to grant children any direct socio-economic entitlements on the basis of the socio-economic rights in section 28. The limitations on children's socio-economic rights have been imported through interpretation from the broader socio-economic rights applicable to everyone. The Courts incorporated the limitations because the socio-economic rights of children are reflected in broader terms in the socio-economic rights that everyone is entitled to.

The right to social services however, does not have a corresponding socio-economic right applicable to everyone. It could be argued that the limitations applied to the other socio-economic rights could not apply to the right to social services for this reason. This would mean in effect that the State has the obligation to prioritise the funding and implementation a system of social services that protects children from abuse and neglect. In addition, the duty to provide such a system is not subject to progressive realisation, nor can a failure to provide such a system be excused on the grounds of lack of available resources. The only limitation applicable to the right to social services would therefore be the general limitations clause found in section 36 of the Constitution.

The next chapter provides a summary of the findings of this paper.

Chapter 5: Conclusion

5.1 Summary of findings

The aim of this paper is to define the full scope and content of children's constitutional right to social services with the purpose of determining the State's full obligations towards children in terms of this right. This is important because, only once the full scope and content of a right is known, can it be ascertained if the State is actually living up to these obligations. In other words, only when it is known what exactly the Constitution entitles children to can it be established if the State is honouring its obligations towards children.

It is now a very appropriate time to define the right to social services. The Department of Social Development currently has to refocus its efforts towards the realisation of social services. Previously, most of the resources allocated to this department were spent on the payment of grants – giving effect to the right to social security in the Constitution. This is a very important right, but it does not negate the need to provide social services to those that need them. At the same time a new South African Social Security Agency has recently been established to take over the payment of social grants. This will free up the Department of Social Development to deal exclusively with social services.

Another reason why defining the right to social services now is very important is because the Department of Social Development is currently drafting a new and important piece of legislation, namely the Children's Bill. This Bill is aimed at giving effect to the rights of children, in particular the right to be protected against abuse, neglect and degradation; the right to family and parental care and the right to social services. As was explained earlier, the first Bill has already been passed. The second Bill will be tabled in Parliament in the second half of 2006 and will define the 'basket of children's social services. Only if the full scope and content of the right to social services is known, will it be possible to determine if the Children's Bill can actually give effect to this right.

Social services are commonly understood to be the service delivery arm of a welfare system. There are a number of different types of welfare systems in which the State's involvement in the well-being of its citizens can vary greatly. The meaning of the term 'social services' in the Constitution therefore must correspond to the type of welfare system that operates in the country. This paper set out the different types of welfare systems that have been developed over time.

Before 1994, South Africa operated under a residual welfare system. This system reinforced apartheid policies and therefore did little to address the many social problems that the majority of people faced under apartheid, such as poverty. The Constitution marked a decisive break with the past and aimed to address the many inequalities perpetuated under apartheid. In terms of a welfare system, the Constitution granted people a wide variety of socio-economic rights. These rights were specifically designed to address systematically and progressively the deep socio-economic inequalities inherited from the old system. The drafters of the Constitution acknowledged the role of social services in dealing with children with for example family problems, or children who were neglected and abused. Social services were seen as a way to contribute to the social welfare of both the individual and groups in the community.

At the time when the new Constitution was drafted, stakeholders in welfare circles also began to rethink the role that their profession could play in the transformation of the country. The idea of developmental social welfare was most attractive at that time because it explicitly combines economic and social development. It is therefore the only welfare system that incorporates elements of economic development and growth, while at the same time addresses social development. The *White Paper for Social Welfare* advocates a developmental approach to social welfare. It is argued that, along with the institutional model, this type of welfare system would be the most appropriate to use to interpret the right to social services. The institutional model should also be considered since it has indirect benefits for the economic growth of the country. Investments in the human capital of the country and particularly in children are likely to bring economic returns in the long run and therefore will also contribute to economic development.

The drafters of the Constitution were greatly influenced by the UNCRC, which South Africa ratified during that time. They therefore incorporated aspects of the UNCRC into the national legal system. The UNCRC and other international law are therefore highly relevant in determining the scope and content of all the rights of children, including the right to social services.

The approach taken by the UNCRC and other international law literature is that the protection of children is best achieved in a family environment. Parents and families should therefore be supported and strengthened to enable them to protect the children. This fits into a developmental or an institutional approach to social welfare, because, by investing in the family structure, the State saves on more expensive interventions if the family structure breaks down later. At the same time the maximum development of the child's potential is promoted, thereby increasing the chances of that child becoming an active member of society and contributing to the resources of the State. The other advantage of this approach is that other vulnerable members of the community will also be supported in the family environment if the family unit receives adequate support and protection. This also means that the State won't have to spend its resources on providing the necessary care and protection for these vulnerable groups.

The UNCRC and the ACRWC oblige state parties to protect children from abuse, neglect, degradation and other forms of maltreatment. Social programmes should act as protection mechanisms to provide support for the child and for those who care for the child. The UNCRC and the ACRWC clearly envisage that the protection from abuse and neglect is facilitated through support by the State to the parents or whoever may be caring for the child. The right to family and parental care is therefore thematically linked to the right to the protection against abuse, neglect, degradation and other forms of maltreatment. The Committee on the Rights of the Child has in fact linked the two rights in its reporting guidelines.

As in the UNCRC and the ACRWC, the South African Constitution contains the right of children to family care, parental care or appropriate alternative care. The Constitution also contains the right of children to be protected against abuse, neglect or degradation. It was argued in this paper that the right to social services must be interpreted in light of these two rights. All the services prescribed under international law and that would fall under a developmental or institutional system of social welfare would therefore constitute the services to which children are entitled under the Constitution in terms of the right to social services.

An analysis of the international law shows that the child protection system should operate in different layers, each corresponding to the right that the service aims to

realise. But in reality, preventative services tend to be dropped first when the budget is too tight simply because agencies cannot turn away people in immediate crisis situations.

Services in terms of all the layers have a preventative function. The first layer speaks to the right to family care and protection. This layer arguably has the biggest preventative function because it seeks to prevent the need for further interventions. The second layer speaks to the right to appropriate alternative care. The third layer deals with services that are directed to protect all children – regardless of their care arrangements – against all forms of abuse and neglect. Some services that fall under this article can also be classified under services that relate to the right to family care and protection. Fourthly, international law mandates a rehabilitative layer. The services delivered under the apartheid system were mainly rehabilitative as social workers only got involved once the problems seemed unfixable. These were specialised, costly case-by-case interventions.

Finally, international law also mandates that certain children have the right to special care and protection and, therefore, the child protection system should have a layer of services responding to children with special needs. Such children are those who are temporarily or permanently deprived of their family environment, such as unaccompanied foreign minors, for example. Children with disabilities are also considered to require special care and protection.

It must be noted however that every layer essentially performs a preventative function. Adoption for example falls under the right to appropriate alternative care but it also has a preventative function in the sense that further child abuse or neglect could be prevented. This implies the need for a system working effectively with the cases that come to light, as well as working towards addressing the many factors that contribute to the abuse.

The child protection system that gives effect to the right to social services should therefore focus equally on all interventions. Interventions that enable parents to fulfil their child-rearing responsibilities adequately are extremely important because funding to these interventions is usually cut first. If parents cannot fulfil their functions alternative care options must be in place. Furthermore, effective protection mechanisms should be put in place. These protective measures naturally have a preventative aspect as they are aimed at avoiding further abuse and neglect of the child.

If these interventions have failed, the right to social services mandates that rehabilitative action take place. This layer also has preventative dimensions because, once these types of services have been carried out, chances are that the abuse won't happen again and it is therefore being prevented.

Children with special needs must also be considered in terms of the right to social services.

The jurisprudence of the South African Courts thus far can, to a certain extent, confirm the conclusions reached in this paper. The Courts have not dealt with the right to social services, nor have they indicated what they consider as the scope and content of the right to social services. They have, however, confirmed a number of points made in this paper.

Firstly, they have confirmed that section 28 in the Constitution – the child rights section – is in fact a mechanism meant to realise the UNCRC obligations. They have

also confirmed that the primary duty to care for children lies with the parents and the family, but that the State has a duty to assist the family if they cannot provide for the child. Furthermore, the Courts have confirmed that there is a link between the right to family care and the right to protection against abuse and neglect. In this respect, the Courts have made it clear that the State has a duty to prevent the abuse and neglect of children living in a family environment by creating an adequate and well-functioning child protection system. The jurisprudence also shows that the Courts accept that the State has a duty to provide special care and protection to children who are not in a family environment. One case dealing with unaccompanied foreign minors illustrated how social services can be used to protect the child from abuse, neglect and degradation, as well as other forms of exploitation.

The interpretation of the right to social services put forward in this paper is therefore compatible with the jurisprudence of the Courts thus far. There are however tremendous gaps in the jurisprudence. The Courts have yet to elaborate on the State's specific obligations towards children who live in a family environment but whose parents are not able to provide for their basic needs. The Courts also have not yet elaborated on the scope and content of children's socio-economic rights, which would provide insight into the relationship between the socio-economic rights of everyone and the socio-economic rights specific to children.

The definition of the right to social services put forward in this paper suggests that the State has a constitutional obligation to fund adequately and to implement properly a child protection system that gives effect to this right in light of the welfare model mandated by the Constitution. Social services under such a model has to emphasise the preventative and protective functions of service interventions, while at the same time not neglecting the rehabilitative services needed once protection and prevention have failed. The welfare model mandated by the Constitution also requires that adequate attention is paid to the rights of children with special needs, thereby promoting and ensuring their right to equality.

5.2 A list of services

A list of services required under a comprehensive child protection system have been summarised in this section. This list is not complete, as it needs to be expanded by input from practicing social service professionals. It should be noted also that the categories identified here are not represented in this way in Department of Social Development policy documents. This list is merely serving as a starting point to drawing up a complete list of services and it is based on the classification of services used in the chapter on international law in this paper:

5.2.1. Services aimed at giving effect to the right to family care or parental care: Preventative services

In terms of article 5 (UNCRC) and article 18 (ACRWC): The State must recognise a variety of family structures:

- The State must have programmes aimed at educating children, parents, caregivers and professional groups (e.g. social workers) on the rights of children and responsibilities of the caretakers in a variety of care settings.

In terms of articles 19 and 27 (UNCRC) and article 20 (ACRWC): Parents have common responsibilities for caring and providing an adequate standard of living for their children:

- Mechanisms enabling maintenance claims;
- Education about and assisting with maintenance claims for single parents;
- Measures encouraging both parents to take part in their children's upbringing (if this is in the best interests of the child);
- Fair labour practices encouraging both men and women to care for their children;
- Studying single parenthood and developing programmes and services to meet the needs of single parents;
- Family planning programmes and education about child spacing;
- Support programmes for families who are at the risk of breaking down and assisting them to deal with their child-caring responsibilities;
- Counselling for family problems, including alcohol and drug counselling;
- Life-skills and relationship education;
- Child-care facilities for children of working parents, such as crèches, supervised recreational care or after-school care;
- Development of services assisting with the care of children such as centres for mothers with babies, play groups, and youth clubs;
- Multi-disciplinary services such as child guidance, school-based medical staff and advice centres;
- Early childhood development programmes;
- Education programmes on the rights of the child for people working with children, such as social service professionals, teachers, nurses, doctors and lawyers.

Articles 9 (UNCRC) and article 19 (ACRWC) give the right to remain with the parents. In terms of these articles, a child should not be removed from the family for reasons of poverty or homelessness:

- Ensure that all interested parties have a chance to participate;
- Ensure professionals can assess what is in the best interests of the child;
- If child has been removed, professionals must assess if contact with the parents is in the best interest of the child;
- If such contact is in the best interest, services must facilitate and monitor the contact between the child and the parents with a view of reuniting the child with the parents as soon as possible.

5.2.2. Services for children who have been deprived of their family environment: Protective services

Articles 20, 21 and 25 (UNCRC) and article 24 and 25 (ACRWC) imply that children who are temporarily or permanently deprived of their right to family or parental care are entitled to special care and assistance. There is a hierarchy of options of placement: first in the larger family, then in a family-like environment and only if these fail should the child be placed in an institution:

- Social workers must have the authority to co-ordinate a variety of services from other state departments and services providers;
- Services to encourage the reunification of children with their parents if they have been separated;
- Foster-placement services;
- Training for foster parents on how to provide care and protection for children who have possibly suffered emotional loss and trauma;

- Supervision of foster placements;
- *Kafalah* of Islamic law;
- Placement in suitable institutions;
- Adoption services: best interests of the child must be 'paramount' consideration;
- Practical assistance to street children and refugee children;
- Services for children that have suffered from child labour or trafficking;
- Practical and material assistance to child-headed households;
- Periodic review of the placement of the child;
- Collection of data on child abandonment, refugee children, disabled children and asylum-seeking children, as well as all other children who do not have family care and protection;
- Competent authorities must provide the services;
- All parties must give informed consent based on counselling;
- All placements in terms of these articles must be reviewed.

5.2.3. Services to prevent the abuse of neglect of children, including remedial services for abused and neglected children: Protective services

Article 19 in the UNCRC and article 16 of the ACRWC imply that research should be conducted into the causes of domestic violence and child abuse. In domestic violence cases, clear procedures should exist and should be applied consistently. For the services to be delivered effectively it is also crucial that there is inter-departmental cooperation between all the departments that have a role to play in delivering protective services to children:

- Social programmes or special monitoring units that support the child and the person caring for the child – this includes rehabilitation and drug counselling for people caring for a child where this is an issue;
- Measures adopted for the identification, reporting, referral, investigation, treatment, and follow up of instances of abuse and neglect;
- Confidential help lines;
- Advice and counselling for children suffering from abuse;
- Training for people working with abused children;
- Services directed at women and children suffering from domestic violence;
- Reintegration services for abused, neglected or exploited children;
- Rehabilitation for children abusing drugs or narcotics;
- Community based day-care centres and family education programmes;
- Training of specialised personnel to deal with child abuse cases.

These articles are linked to the articles 25 (periodic review of placement of the child) and article 39 (right to rehabilitation and reintegration services) in the UNCRC.

5.2.4 Rehabilitative services

Article 39 (UNCRC) deals with the right of children to rehabilitation and recovery programmes if the child has been abused, neglected, exploited, tortured or has suffered any other form of cruel, inhumane, or degrading treatment or punishment:

- Services for children that have suffered any form of abuse or neglect must aim to foster the health, self respect and dignity of the child;
- Recovery and reintegration programmes;
- Psychological counselling for the families and their children;
- Gender-sensitive training for staff;

- Services and guidance on how to support the family without having to resort to exploitative practices.

5.2.5. Services for children in need of special care and protection.

Refugee children are dealt with in the UNCRC under article 22 and in article 23 in the ACRWC. Child refugees that are not accompanied by their parents or caregivers are also considered to be children deprived of their family environment. They are therefore entitled to special protection and assistance in addition to all the other services listed above, as well as:

- Reunification and family-tracing services;
- Humanitarian assistance for children and their families as far as this is possible in the country of conflict;
- Registration of the child in the country as a refugee through interviews detailing the particulars of the child and all other relevant information;
- Appointment of guardian or advisor who can assist the child and give consent.

The rights of children with disabilities are covered in article 23 of the UNCRC:

- Access to rehabilitation services;
- Services enabling the maximum possible social integration;
- Family support to families with children with disabilities;
- Information campaigns about disability and how it can be prevented;
- Services enabling the vocational training of children with disabilities.

Other categories of children in need of special care and protection include children who live or work on the streets; children who have suffered from the worst forms of child labour; children who have been trafficked; and children with chronic illnesses.

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Children

28. (1) Every child has the right –

- (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and **social services**;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that –
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section “child” means a person under the age of 18 years.

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