

THE SOCIO-ECONOMIC RIGHTS OF
CHILDREN WITH DISABILITIES IN
SOUTH AFRICA: A COMPARISON
BETWEEN THE AFRICAN CHARTER ON
THE RIGHTS AND WELFARE OF THE
CHILD AND THE CONVENTION ON THE
RIGHTS OF PERSONS WITH DISABILITIES

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Summary

International law plays an important role in the promotion and protection of the socio-economic rights of children with disabilities. International law bolsters the mechanisms used to keep states accountable in the fulfilment of their obligations. This article discusses two international law instruments, namely, the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Persons with Disabilities, with the aim to examine how they provide for and protect the socio-economic rights of children with disabilities in the South African context and, by implication, children in the African context as a whole. Socio-economic rights place a duty on states to ensure that all people have access to the basic necessities of life, which include education, health care, food and water. Access to these and other services ensures that children with disabilities, like all other children, grow and develop in a manner that is cognisant of their specific needs and best interests. The discussion takes the form of a focused comparison of the two instruments, through which similarities and differences will be highlighted. The discussion further points out the different ways in which these instruments could reinforce the protection provided in national law to ensure that the socio-economic rights of children with disabilities in South Africa are protected and promoted.

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1 Introduction

Children with disabilities constitute the majority of children in South Africa who are in need of special protection and services to ensure their maximum development and inclusion in different spheres of society.¹ These protections and services are provided in different ways, including through the protection and promotion of a number of socio-economic rights. The article acknowledges the important role international law plays in the protection and promotion of socio-economic rights. International law bolsters and backs the mechanisms used to keep South Africa accountable in the fulfilment of its obligations. The mechanisms referred to in this instance are the Constitution and legislation² that contain South Africa's obligations and ways in which these obligations are to be carried out.

The international law instruments that will be the focus of the article are the African Charter on the Rights and Welfare of the Child (African Children's Charter)³ and the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD).⁴ The African Children's Charter is identified as the human rights instrument developed to meet the contextual needs of children in Africa. As such, it includes children with disabilities in South Africa. The CRPD is identified as the recently-ratified human rights instrument that focuses specifically on the rights of persons with disabilities, including children with disabilities.⁵ Both these instruments have an important role to play in ensuring the protection and promotion of the socio-economic rights of children with disabilities in South Africa. The article aims to provide a focused comparison of the two instruments to highlight the similarities and differences between the instruments. It will also point out the different ways in which these instruments could reinforce the national protections utilised to ensure the protection and promotion of the socio-economic rights of children with disabilities in South Africa.

1 Department of Women, Children and Persons with Disabilities, Department of Social Development and United Nations Educational, Scientific and Cultural Organisation (UNESCO) *Children with disabilities in South Africa: A situation analysis 2001-2011* (2012) 11-12.

2 These include the Children's Act 38 of 2005; the Schools Act 84 of 1996; and the Social Assistance Act 13 of 2004.

3 The African Charter on the Rights and Welfare of the Child was adopted July 1990, OAU Doc.CAB/LEG/ 24.9/49 (entered into force 29 November 1999).

4 The United Nations Convention on the Rights of Persons with Disabilities was adopted by the United Nations General Assembly on 13 December 2006 and opened for signature in March 2007.

5 This article will refer to children with disabilities and not persons with disabilities when it discusses the provisions of the CRPD and its implementation. This is done to highlight the fact that children with disabilities form part of the wider group of persons with disabilities who benefit from the CRPD in the same way and, in some cases, more than adult persons with disabilities.

2 Socio-economic rights in the South African context

Socio-economic rights place a duty on the state to ensure that all its members have access to the basic necessities of life, such as education, health care, food, water, shelter as well as access to housing.⁶ Access to these rights and/or services ensures that members of society are able to fully enjoy their other inter-related rights, such as the right to human dignity, equality, non-discrimination, expression and political participation.⁷

Socio-economic rights are set out and protected in the South African Constitution. Some of these rights, and specifically those that will be the focus of the article, are contained in sections 26 and 27 of the Constitution. Section 26 provides, among other things, that everyone has the right to adequate housing. It places a responsibility on the state to take reasonable legislative and other measures to progressively realise this right within its available resources. Section 27 provides that everyone has the right to have access to health care, food, water and social security, as well as social assistance if they cannot support themselves and their dependants. The state must take reasonable legislative and other measures within its available resources to ensure the progressive realisation of each of these rights. These rights are applicable to ‘everyone’, including children with disabilities.

Children, including children with disabilities, have additional socio-economic rights set out in section 28(1)(c) of the Constitution. This section provides that ‘[e]very child has the right ... to basic nutrition, shelter, basic health care services and social services’. Section 28(2) goes on to provide that the best interests of a child should be considered paramount in all matters concerning the child. This section does not contain the ‘available resources’ and ‘progressive realisation’ limitations similar to the sections 26 and 27 rights. This also applies to the section 29(1)(a) right to basic education.⁸ This has resulted in the conclusion that children have ‘immediate and effective access’ to the services and resources protected therein.⁹ This is especially true as far as children who are in the care of the state or in alternative care are concerned.¹⁰

6 J Brickhill & N Ferreira ‘Socio-economic rights’ in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 564.

7 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 23; Brickhill & Ferreira (n 6 above) 564.

8 Sec 29(1)(a) of the Constitution provides, *inter alia*, that ‘everyone has the right to a basic education’.

9 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 234.

10 *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 233 (T) paras 2271-J.

Despite these commendable constitutional protections, currently there exists no jurisprudence or legislation that ‘gives substance to the meaning of socio-economic rights’ or minimum core.¹¹ International law and regional law, therefore, are very important as they provide guidance on the content of socio-economic rights and ways in which to measure progress in the implementation thereof.¹² In this regard, it is important to note a constitutional obligation imposed by in section 39(1)(b) of the Constitution, which provides that ‘[w]hen interpreting the Bill of Rights, a court, tribunal or forum must consider international law’. The Constitutional Court has recognised that ‘[i]nternational agreements and customary international law provide a framework within which ... [the Bill of Rights] can be evaluated and understood’.¹³

3 An overview of the African Charter on the Rights and Welfare of the Child

The African Children’s Charter has been signed and ratified by 41 African

11 P Proudlock ‘Children’s socio-economic rights’ in T Boezaart (ed) *Child law in South Africa* (2009) 292-302-303. See also M Pieterse ‘Coming to terms with judicial enforcement of socio-economic rights’ (2004) 20 *South African Journal on Human Rights* 406-407; D Blitchitz ‘Giving socio-economic rights teeth: The minimum core and its importance’ (2001) 119 *South African Law Journal* 484. The Constitutional Court has declined to be drawn into making decisions on the ‘minimum core’ applicable to socio-economic rights in South Africa. In *Mazibuko & Others v City of Johannesburg & Others* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) paras 59-60, the Constitutional Court was of the view that ‘[f]ixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable ... [O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.’ Statements of a similar nature were made in *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46; 2000 (11) BCLR 1169 para 32 and in *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721; 2002 (10) BCLR 1033 para 38. However, it could be argued that judicial precedent on the fulfilment and implementation of socio-economic rights has, over the years, in an indirect manner, started the process of determining the minimum core of socio-economic rights in the Constitution. Eg, in relation to children’s socio-economic rights, a number of judgments have discussed what it means to have access to basic education. Judgments have found that it includes the provision of educator and non-educator posts (*Centre for Child Law v Minister of Basic Education & Others* [2012] 4 All SA 35); the provision of school furniture (*Madzodzo & Others v Minister of Basic Education & Others* 2014 (3) SA 441 (ECM)); the provision of textbooks (*Section 27 & Others v Minister of Education & Another* 2013 (2) SA 40 (GNP) and *Minister of Basic Education v Basic Education for All* [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA)).

12 Proudlock (n 11 above) 292.

13 *S v Makwanyane & Another* 1995 (6) BCLR 665; 1995 (2) SACR 1 paras 36-7, as quoted in Currie & De Waal (n 6 above) 146.

countries, including South Africa.¹⁴ Nine countries have signed but not yet ratified the Children's Charter, and four countries have neither signed nor ratified it.¹⁵ The African Children's Charter arose as a result of frustration felt by African countries towards the UN Convention on the Rights of the Child (CRC) which was a product of a number of compromises that had to be made to ensure consensus among states with different backgrounds.¹⁶ Provisions that would have adequately covered issues peculiar to the African context were not sufficiently addressed.¹⁷ For example, the CRC failed to deal with the following issues distinct to the African context:

- the disadvantages that the girl child experiences in the African context;
- widespread practices in the African context such as female genital mutilation and circumcision;
- the important role, responsibilities and duties that the African context gives to the family and community in the upbringing of children; and
- the socio-economic conditions that African children experience and are exposed to that affect their survival.

The African Children's Charter was developed in order to ensure that the CRC was given specific application¹⁸ in the African context.¹⁹ A more specific explanation of why the Children's Charter came about, with the above frustrations in mind, is that it was the result of a desire by African states to deal with and address challenges peculiar to African children.²⁰ This is recognised in the Preamble to the Charter, which states:

NOTING WITH CONCERN that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safe guards and care.

14 African Commission on Human and Peoples' Rights 'Ratification table: African Charter on the Rights and Welfare of the Child' <http://www.achpr.org/instruments/child/ratification/> (accessed 6 March 2016). South Africa ratified the African Children's Charter on 7 January 2000.

15 As above.

16 F Viljoen 'The African Charter on the Rights and Welfare of the Child' in Boezaart (n 11 above) 335; BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *South African Public Law Journal* 3-7; A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 1 *African Human Rights Law Journal* 12-15.

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

18 As above.

19 Mezmur (n 16 above) 6.

20 Viljoen (n 17 above) 205.

The African Children's Charter is an embodiment of the acknowledgment that 'each region, with its unique culture, traditions and history, is best placed to handle and resolve its own human rights situation'.²¹ The importance of the Charter (and other regional instruments) is cemented by the UN General Assembly which affirms that regional instruments that ensure the protection and promotion of human rights could make a major contribution to the effective enjoyment of human rights.²²

In addressing African peculiarities and other concerns, the African Children's Charter aims to accomplish the goal of ensuring that the African child receives care for his or her health and physical, mental, moral and social development.²³ This is achieved by taking into account the virtues of the child's cultural heritage and historical background.²⁴

4 An overview of the Convention on the Rights of Persons with Disabilities

The CRPD entered into force on 3 May 2008.²⁵ Thirty-four African countries, including South Africa, have ratified the Convention.²⁶ The working group that developed the CRPD consisted of delegates from seven African countries, which included Cameroon, Comoros, Mali, Morocco, Sierra Leone, South Africa and Uganda.²⁷

The CRPD was developed to ensure the existence of an internationally-affirmed document that articulates the manner in which human rights and freedoms apply specifically to persons with disabilities, including children.²⁸ The CRPD is essentially a comprehensive and integral international human rights instrument that has been developed to promote and protect the rights and dignity of persons with disabilities.²⁹ It is the mechanism that ensures redress of the profound social disadvantage

21 Viljoen (n 17 above) 205-206.

22 Mezmur (n 16 above) 5.

23 Preamble African |Children's Charter.

24 As above.

25 United Nations 'Convention on the Rights of Persons with Disabilities' <http://www.un.org/disabilities/default.asp?id=150> (accessed 9 March 2016).

26 J Lord & MA Stein 'Prospects and practices for CRPD implementation in Africa' in C Ngwenya et al *African disability rights yearbook 2013* (2013) 98-99. South Africa ratified the CRPD on 30 November 2007; see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 7 March 2017).

27 The working group was established by an *ad hoc* committee created by the UN General Assembly to analyse the possibility of developing a convention dealing with the rights of persons with disabilities. The working group's mandate was to elaborate on a draft text of the Convention (see A Palacios & M Walls 'Changing the paradigm – The potential impact of the United Nations Convention on the Rights of Persons with Disabilities' in J Allain & S Mullally *The Irish yearbook of international law* (2006) 130).

28 Palacios & Walls (n 27 above) 100.

29 Preamble to the CRPD.

that persons with disabilities experience despite the existence of various other human rights instruments.³⁰

The CRPD affirms a number of important principles that ensure the protection and promotion of the rights of persons with disabilities. These principles also guarantee the full enjoyment of the human rights and fundamental freedoms of persons with disabilities without discrimination.³¹ Disability is understood as an evolving concept resulting from the interaction with attitudinal and environmental barriers that hinder the full and effective participation in society by persons with disabilities on an equal basis with others.³² The CRPD acknowledges that discrimination on the basis of disability is a violation of the inherent dignity and worth of the human person.³³

5 A comparison between the protection of socio-economic rights entrenched in the African Children's Charter and the CRPD

The African Children's Charter and the CRPD have both been formulated to protect particularly vulnerable groups of people, namely, African children and persons with disabilities, who historically did not enjoy sufficient protection through international instruments. This was the case despite the fact that the international instruments applied to them equally as to other people. The general international instruments, however, did not meet their special needs in the same way the African Children's Charter and the CRPD do. What follows is a comparative examination of the Children's Charter and the CRPD and how they provide for the protection and promotion of the socio-economic rights of African children with disabilities, focusing on children in the South African context. The discussion begins with the foundational principles that apply in all circumstances, including those relating to socio-economic rights.

5.1 Foundational principles and provisions in the African Children's Charter and the CRPD specifically relating to children with disabilities

The African Children's Charter and the CRPD are both based on foundational principles that guide the interpretation and application of these instruments. They also contain provisions that relate specifically to children with disabilities, which are highlighted in the next sections.

30 As above.

31 As above.

32 As above.

33 As above.

5.1.1 African Charter on the Rights and Welfare of the Child

Gose identifies four foundational provisions or pillars that the Children's Charter is based upon, namely, non-discrimination; the best interests of the child; the right to survival and development; and the right of the child to participate in matters concerning his or her well-being.³⁴ Gose describes these as the 'soul' of the instrument.³⁵

Article 3 of the African Children's Charter contains the non-discrimination clause which provides as follows:

Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

One immediately notes that the article does not include disability as a prohibited ground of discrimination.³⁶ Despite the fact that the article applies to all children, including children with disabilities, one cannot but lament the fact that the African Children's Charter did not take advantage of the unique opportunity to affirm the importance of the rights and freedoms of children with disabilities.³⁷ Nevertheless, the article's relevance to all children, including children with disabilities, ensures that children with disabilities should not be discriminated against in their claim to the socio-economic rights set out in the Children's Charter. In addition to the article applying to all children, the inclusion of the phrase 'other status' is an indication of the fact that the list provided is not an exhaustive one and that, therefore, recognition should be given to 'other forms of differential treatment that cannot reasonably and objectively be justified'.³⁸ This would include discrimination against persons with disabilities that would impair the recognition, enjoyment or exercise of their rights.³⁹

Article 4 of the African Children's Charter provides for the best interests of the child, and states that the best interests of the child should be the primary consideration in all actions affecting the child, which includes

34 M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 17. The CRC Committee identified these principles as foundational principles to the implementation of the CRC as well (see General Guidelines regarding the form and content of initial reports to be submitted by States Parties under art 44, para 1(a) of the Convention: 19/10/30 CRC/C/5 [13]).

35 Gose (n 34 above) 17.

36 H Combrinck 'The hidden ones: Children with disabilities in Africa and the right to education' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 310.

37 As above.

38 General Comment 20 Non-discrimination in economic, social and cultural rights (art 2 para 2 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/20 (2 July 2009) paras 15 & 27.

39 As above.

children with disabilities. State parties, therefore, should mould their laws and policies with the best interests principle in mind.⁴⁰ This, in essence, would mean that states must be cognisant of the best interests and special needs of children with disabilities, particularly in their formulation of laws and policies aimed at meeting the needs of persons with disabilities, including laws and policies relating to socio-economic rights.⁴¹ Article 4 states that the best interests of the child must be of primary consideration. The use of the definite article 'the' elevates the influence the principle has over other considerations.⁴²

Article 4(2) provides for the rights of children, including children with disabilities, to participate in matters concerning his or her well-being. Article 4(2) also provides that a child who is capable of communicating his or her own views should be provided the opportunity to do so in judicial and administrative matters affecting him or her. The views can be expressed directly by the child or through an impartial representative. Article 4(2) further provides that the child's views must be taken into consideration by the relevant authorities. The child is placed in the position of an active participant who has an opportunity to, in one way or another, influence decisions taken in matters involving him or her.⁴³

This article has limitations, such as the fact that the phrase 'who is capable of communicating his or her views' is restrictive in that this ability may relate to age, level of education and the ability to communicate verbally or to write.⁴⁴ This does not take into account children who can communicate, not in the traditional manner, but through other means such as body language.⁴⁵ This is especially unaccommodating for children with disabilities whose only means of communication are in ways other than speaking or writing, such as sign language.

The article is further limiting as it only provides for children's views to be expressed in judicial and administrative proceedings and not in other forums or spaces that affect children, such as the family environment. This is restrictive in the area of socio-economic rights, as children with disabilities should be able to express their views, life experiences and needs when laws and policies on socio-economic rights are being formulated, without any restrictions. Article 7 seems to be a redeeming characteristic as it allows children, therefore also children with disabilities, to freely express their opinions in all matters. However, article 7 also contains the limitation that only children who are capable of communicating their views can express their opinions.

40 Gose (n 34 above) 26; Lloyd (n 16 above) 17.

41 As above.

42 As above.

43 Viljoen (n 16 above) 338.

44 Gose (n 34 above) 124; Viljoen (n 16 above) 338.

45 As above.

Article 5 of the African Children's Charter provides for the right to survival and development. Article 5(2), which is important for purposes of this article, places the obligation on states, to the maximum extent possible, to ensure the survival, protection and development of the child. One of the ways in which article 5(2) could be interpreted is that states are placed under the obligation, among other things, to ensure the protection and provision of socio-economic rights, as this is one of the ways of making sure that children survive, grow and develop in the best manner possible. This especially includes children with disabilities. The limitation of this right, namely, the fact that states are given the option to do this to the maximum extent possible, could mean that states may argue that, because of scarce resources, they are not able to ensure that socio-economic rights are fully protected.⁴⁶

Article 13 of the African Children's Charter, which deals specifically with the protection necessary to ensure the advancement of the rights of children with disabilities, is linked to these foundational pillars for children with disabilities. Article 13(1) of the Children's Charter provides that children with disabilities have the right to special measures of protection to meet their physical and moral needs. These special measures of protection must be provided under conditions that respect their dignity and promote self-reliance and active participation in their communities.⁴⁷ Article 13(2) of the African Children's Charter details the special measures that states must undertake in order to comply with article 13(1).⁴⁸ Article 13(2) provides as follows:

State parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.

The article makes the assistance to be provided subject to available resources.⁴⁹ However, the Children's Charter only requires that the circumstances of the child's special situation be taken into account. The Charter does not go into as much detail as the CRC where in articles 23(2) and (3) it is provided that the circumstances of the parents or the caregivers must be taken into account and that services must be provided free of charge where possible.⁵⁰ The fact that the African Children's Charter does not state that the circumstances of the parents or caregiver be taken into account could allow for services to be extended to a larger group of

46 Gose (n 34 above) 44.

47 As above.

48 Gose (n 34 above) 90.

49 As above.

50 Art 13(2) African Children's Charter; arts 23(2) & (3) CRC; Gose (n 34 above) 90.

children than the CRC covers, whose parents or caregivers could care for them without state assistance.⁵¹ The list of services to be provided does not include education, health care services and rehabilitation which are provided for in the CRC.⁵²

5.1.2 *Convention on the Rights of Persons with Disabilities*

Article 3 of the CRPD sets out the foundational provisions or pillars of the CRPD as indicated below:

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

For purposes of this article, only three of the above will be dealt with, namely, respect for inherent dignity; non-discrimination; and respect for the evolving capacities of children with disabilities. These pillars have been described as the 'moral compass' of the CRPD.⁵³

Respect for the inherent dignity of all human beings, including children with disabilities, requires that all treatment and interaction be carried out in a manner that is respectful and shows concern.⁵⁴ Respect for the inherent dignity of all must filter into how all other human rights, including socio-economic rights, are applied and interpreted.⁵⁵ Bassler notes the importance of respect for inherent human dignity by stating the following:

[Respect for inherent dignity] means that people must be treated as ends in themselves, first as people and only then as people with particular characteristics. For people with disabilities this means asking the question about whether the treatment or interaction is predicated on preserving and

51 As above.

52 Art 23(3) CRC.

53 R Kayees & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 27.

54 Currie & De Waal (n 13 above) 251.

55 As above.

protecting the moral worth of the individual, not some idea about the person's disability ...⁵⁶

The African Children's Charter does not contain a provision specifically requiring respect for inherent dignity. Therefore, in this regard the CRPD plays a very important role. The CRPD ensures that the inherent dignity of children with disabilities is placed at the forefront of actions purporting to protect and provide services to these children. The promotion and protection of the socio-economic rights and the resultant formulation of laws and policies as well as the provision of services to children with disabilities must be buttressed by respect for the inherent dignity of such children.

Article 5 of the CRPD touches on equality and non-discrimination of persons, including children with disabilities. The article, among other things, provides that all persons are equal before and under the law and are entitled to equal protection by and benefit of the law without having to suffer any discrimination. States bear the responsibility to prohibit all forms of discrimination on the basis of disability and to guarantee to all persons with disabilities equal and effective protection against all forms of discrimination. In order to fulfil their obligations, states must take all appropriate steps to ensure that reasonable accommodation is provided. Finally, article 5 recognises that it may be necessary to take specific measures to hasten or achieve the equality of persons with disabilities. It notes that this will not be considered discrimination under the CRPD.

This clause differs from article 3 of the African Children's Charter. It applies specifically to persons with disabilities and, therefore, captures the protection needs of children with disabilities more clearly. It does not list the grounds on which a person should not be discriminated against, but broadens the scope of protection by stating that all discrimination on the basis of disability is prohibited. Read with article 3 of the Children's Charter, this would offer stronger protection to children with disabilities in South Africa, as there would be the recognition that children with disabilities should not be discriminated against because they are children or on the basis of their disability.

Article 5 of the CRPD places the responsibility on states to ensure equality and non-discrimination, while article 3 of the African Children's Charter does not specifically mention who is responsible for ensuring that children are not discriminated against. The Children's Charter focuses on the child as the rights bearer, whereas the subject in the provision of the CRPD is the state.⁵⁷

56 LA Basser 'Human dignity' in MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011) 36.

57 Gose (n 34 above) 18.

It may be argued that the African Children's Charter offers broader protection against discrimination in the sense that it is not only the state that has the duty of non-discrimination, but everyone that the child comes into contact with. The CPRD, on the other hand, focuses only on the state as duty bearer.

Article 5 of the CRPD recognises that specific measures may need to be implemented to accelerate ensuring the equality of persons, including children with disabilities, and that this will not be considered discrimination. This is especially important in the context of socio-economic rights, where children with disabilities are often in a worse position than other children in their access to socio-economic rights.⁵⁸ Article 3 of the African Children's Charter makes no mention of this.

The inclusion of respect for the evolving capacities of children with disabilities in article 3 of the CRPD is ground-breaking as children with disabilities often have been seen to have little or no capability or competence to learn and develop themselves.⁵⁹ Article 3 ensures that steps are taken to equip children with disabilities with the ability to develop the capacity for learning, developing and decision making, something that is possible through the socio-economic right to education.⁶⁰ This also is not specifically contained in the African Children's Charter. A combined reading of the Children's Charter rights and the CRPD, therefore, ensures the comprehensive protection of children with disabilities.

As in the case of the African Children's Charter, linked to the pillars, the CRPD contains a provision that deals specifically with children with disabilities in article 7. Article 7 provides:

- 1 State parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
- 2 In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

58 See, eg. *Western Cape Forums for Intellectual Disability v The Government of the Republic of South Africa* 2011 (5) SA 87 (WCC), where children with severe and profound intellectual disabilities (that is, having IQ levels of 20-35 and less than 20 respectively) were not provided with education by the state. The children had to rely on services provided by centres run by non-governmental organisations. The centres were also unable to cater for all children with severe and profound intellectual disabilities. The state only provided subsidies to these centres. These subsidies were not sufficient to meet the children's educational needs and were far less than that given to other children.

59 B Byrne 'Minding the gap? Children with disabilities and the United Nations Convention on the Rights of the Persons with Disabilities' in M Freeman *Law and childhood studies* (2011) 427; UNICEF 'Using the human rights framework to promote the rights of children with disabilities: Discussion paper – An analysis of the synergies between CRC, CRPD and CEDAW' (2009) 15.

60 Byrne (n 59 above) 427-428.

- 3 State parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.⁶¹

First, one immediately notes that, unlike the African Children's Charter, which states that the best interests of the child should be *the* primary consideration, the CRPD provides that the best interests of the child shall be *a* primary consideration in matters affecting the child. The formulation of the CRPD is unfortunate,⁶² as it weakens the influence of the best interests principle, and incurs the risk that other values could prevail over the best interests of children with disabilities.⁶³

Second, article 7(3) of the CRPD states that children with disabilities have the right to express their views freely on all matters affecting them. It does not, as in the case of the African Children's Charter, place a restriction on how this expression of views is to be executed. The CRPD's protection of children's participation, therefore, is broader than that provided for in the Children's Charter.

5.2 Socio-economic rights included in the African Children's Charter and the CRPD

The above discussions have clearly defined children with disabilities, like all children, as rights bearers of various human rights, including socio-economic rights, whose rights are independent of the societies and families they come from.⁶⁴ This acknowledges the fact the children with disabilities are 'distinct members of the moral community with distinct interests [and needs] who are appropriately viewed as self-originating sources of valid moral claims with an equal moral status'.⁶⁵

A comparative enquiry will now be carried out on some of the socio-economic rights provided to children with disabilities as distinct rights bearers by the African Children's Charter and the CRPD. This is done to highlight the similarities in and differences between the instruments and the ways in which they can complement and support each other in the furtherance of the socio-economic rights of children with disabilities in South Africa. This is important as socio-economic rights ensure that children with disabilities have access to their basic needs for survival, growth and development.⁶⁶ Three socio-economic rights will be dealt

61 Art 7 CRPD.

62 This formulation in the CRPD is similar to that provided for in art 3(1) of the CRC.

63 Byrne (n 59 above) 429.

64 A Nolan *Children's socio-economic rights, democracy and the courts* (2014) 7.

65 As above.

66 Gose (n 34 above) 81.

with, namely, the right to education; the right to health and related rights; and the right to social security.

5.2.1 Right to education

The African Children's Charter recognises the right to education in article 11, which places an obligation on state parties to promote and protect access to education. Article 11(1) states that every child has the right to education. Article 11(2) sets out the aims of education, which include the promotion and development of children's personalities, talents and mental and physical abilities to the fullest potential; the fostering of respect for human rights and fundamental freedoms set out in African regional and international instruments; the promotion of children's understanding of primary health care; and the preservation and strengthening of positive African morals, traditional values and cultures. Article 11(3) sets out the obligations placed on state parties, which include the provision of free and compulsory basic education and the implementation of special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sectors of the community.

The CRPD recognises the right of children with disabilities to education in article 24. Article 24(1) of the CRPD states that the right to education must be realised on the basis of non-discrimination and equal opportunity. It provides that an inclusive education system must be ensured at all levels. This reiteration and affirmation of the need for and importance of non-discrimination and equality in the context of education is important for children with disabilities as it ensures that the educational environment is one that is free of discrimination, and affirms the specific needs that children with disabilities have and the different ways they are able to contribute. This is not contained in the African Children's Charter and, therefore, it is very important that the two instruments are read together when dealing with the rights of children with disabilities to education.

The aims of education are also set out in article 24(1) of the CPRD. Among others, these include the full development of human potential, a sense of dignity and self-worth, as well as the strengthening of respect for human rights, fundamental freedoms and human diversity; the development by persons with disabilities of their personalities, talents and creativity, as well as their mental and physical abilities, to their fullest potential; and enabling persons with disabilities to effectively participate in a free society. These aims, although in some ways similar, are different in the sense that they are formulated to apply specifically to persons with disabilities. It should, therefore, be read in conjunction with the aims set out in the African Children's Charter, as this will ensure that children with disabilities receive the most out of their education in the South African context.

Article 24(2) contains the obligations on state parties to ensure that the right to education is fully realised. States should ensure that persons with disabilities are not excluded from receiving education on the basis of disability, and that children with disabilities are not excluded from receiving free and compulsory basic education. This is similar to article 11(3) of the African Children's Charter, which also provides for free and compulsory basic education. However, article 24(2) goes further and provides that inclusive, quality and free education should be accessed by persons with disabilities on a basis of equality with others. The distinct requirements of children with disabilities should be reasonably accommodated, and support should be provided in the education system in order to facilitate effective education. In order to make the most of academic and social development, effective individual support measures must also be provided.

Further provisions on the right to education contained in the CRPD (and not in the African Children's Charter) are detailed in articles 24(3) and 24(4) of the CRPD. Article 24(3) sets out the measures states parties must employ in order to ensure that persons with disabilities learn life and social development skills that will facilitate full and equal participation in education and their communities. These measures include:

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

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

The provisions supporting the right to education in the African Children's Charter and the CRPD clearly indicate that the CRPD elaborates on the right in more detail than the Children's Charter.⁶⁷ The more detailed provisions of the CRPD are aimed at ensuring that states

67 Save the Children *See me, hear me: A guide to using the UN Convention on the Rights of Persons with Disabilities to promote the rights of children* (2009) 108.

understand what the right to education means for children with disabilities and what their responsibilities are in this regard.

A comprehensive and well-rounded approach to the application of both the African Children's Charter and the CRPD should be carried out with the aim to ensure that children with disabilities in the South African context and African context in general have unhindered access to education. This is important for disabled children in South Africa, as it is reported that close on 500 000 children with disabilities do not attend school and that hundreds of thousands who are in school have fallen behind.⁶⁸ These alarming figures are linked to a number of shortcomings in the education system, such as that children with disabilities face discriminatory attitudes and admission practices⁶⁹ as they try to access mainstream or special public schools,⁷⁰ and that children with disabilities are exposed and vulnerable to violence and abuse.⁷¹

Another shortcoming in the South African education system is that children with disabilities who attend public schools, particularly special schools, often do not receive quality education.⁷² A number of issues that have been identified that affect the quality of education children with disabilities are exposed to include the standard of curriculum delivery in special schools; a lack of requisite and specialised skills on the part of teachers to adapt teaching practices; poor provision of learner and teacher support material; unequal distribution of educators to schools catering for children with disabilities; and a lack of accessible transport.⁷³ All these challenges, and many others, affect the ability of children with disabilities to acquire –

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

68 Human Rights Watch *Complicit in exclusion: South Africa's failure to guarantee an inclusive education for children with disabilities* (2015) 2.

69 School governing bodies and principals often make arbitrary decisions about whether they will accommodate children with disabilities. Children with, among others, intellectual disabilities, multiple disabilities and autism are often on the receiving end of these decisions. Human Rights Watch (n 68 above) 2.

70 Human Rights Watch (n 68 above) 2-3.

71 Human Rights Watch 2; J Bornman 'Accessing justice via key role players: A view from South Africa' in DN Bryen & J Bornman (eds) *Stop violence against people with disabilities* (2014) 46-48.

72 Human Rights Watch (n 68 above) 2; Department of Basic Education 'Report on the implementation of education: White Paper 6 on inclusive education – An overview for the period 2013-2015' (2015) 34-53.

73 Department of Basic Education (n 71 above) 34-53.

with individual countries and cultures, and inevitably, changes with the passage of time.⁷⁴

The African Children's Charter and the CRPD should be used to keep the South African government accountable in its obligation to address the above challenges and ensure better access to education for children with disabilities.

5.2.2 Health and health-related rights

It has been acknowledged that access to health care services is a challenge for children with disabilities in South Africa.⁷⁵ This needs to be addressed in a manner compliant with international law as articulated, inter alia, in the African Children's Charter and the CRPD. The challenges faced include the following:

a lack of access to the physical environment, lack of access to information in accessible formats; discriminatory and negative attitudes toward persons with disabilities displayed by health and support personnel; a lack of appropriately trained and skilled health personnel concerned with disability ... inaccessible and unaffordable transport, particularly in rural and impoverished communities.⁷⁶

In order to address the above barriers to access health care services, the provisions of the African Children's Charter and the CRPD must be implemented as a matter of urgency. The Children's Charter contains provisions relating to health and health services in article 14, which in article 14(1) begins by providing that every child should enjoy the best attainable state of physical, mental and spiritual health. The CRPD, in article 25, provides that state parties have the responsibility to recognise the right of persons with disabilities to enjoy the highest attainable standard of health without discrimination. States are further required to ensure that all appropriate measures are taken to ensure that persons with disabilities have access to health services, including health-related rehabilitation that is gender sensitive. The African Children's Charter provides for the 'best attainable' state of health, while the CRPD mentions the 'highest attainable' standard of health. This differentiation in expression does not seem to result in any major difference.⁷⁷ However, the CRPD does re-affirm that access to health must not be hindered by discrimination, something the Children's Charter fails to do.

74 UNESCO 'World declaration on education for all and framework for action to meet basic learning needs' (1990) art II.

75 Department of Women, Children and Persons with Disabilities 'Baseline country report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities' (2013) 50.

76 As above.

77 Gose (n 34 above) 82. Gose compares the African Children's Charter and the CRC (art 24(1)) which has the same wording as the CRPD.

The African Children's Charter differentiates between physical, mental and spiritual health, while the CRPD does not contain such differentiation. In making this differentiation, the Children's Charter ensures that there is no ambiguity regarding the meaning of health and, instead, broadens the concept of health.⁷⁸ The CRPD states that health services must be gender-sensitive highlighting women's issues and, in this case, issues of the girl child, which the Children's Charter does not do.⁷⁹ The CRPD also refers to the provision of rehabilitation services to persons with disabilities. This is particularly important for children with disabilities who are in need of rehabilitation services for their continued development and growth.

Article 14(2) of the African Children's Charter provides that state parties must take certain steps to pursue the full implementation of the right to health. These measures, among others, include a reduction in the infant and child mortality rate; the provision of necessary medical assistance and health care to all children, with an emphasis on developing primary health care services; the provision of adequate nutrition and safe drinking water; the use of appropriate technology, within the framework of primary healthcare, to combat disease and malnutrition; and measures to ensure that parents, children, community leaders and community workers are informed of and supported in the use of basic knowledge of child health and nutrition. All these special measures take cognisance of the context in which African children, and in this instance children with disabilities, find themselves, and aim to meet the needs of children in these contexts.

The CRPD complements the protection granted to children with disabilities by the African Children's Charter by requiring state parties to the CRPD to implement certain measures aimed at targeting the specific needs of children with disabilities. These are set out in article 25 and include the following: providing the same range, quality and standard of free or affordable health care and programmes as provided to other persons; and providing health services specifically needed by persons with disabilities, which include early identification and intervention and services aimed at minimising or preventing further disabilities. This is of particular importance to children with disabilities who would benefit from early identification and intervention.⁸⁰ Article 25 also requires state parties to provide health care services as close as possible to the communities where the children with disabilities find themselves, and to prevent the

78 As above.

79 Apart from its reference in art 14(2)(e) to appropriate health care for expectant and nursing mothers and its reference in art 11(3)(e) to the obligation of state parties to take special measures in respect of female children in the promotion of the right to education.

80 Save the Children (n 67 above) 122.

discriminatory denial of health care or health services, food and fluids on the basis of disability.

It is interesting to note that neither the African Children's Charter nor the CRPD contains a limitation clause stating that the right to health is to be provided to the maximum extent possible or within the available resources.⁸¹ This, therefore, could result in a 'higher level of protection, and result in constant pressure on the state ... to further the full achievement of the right'.⁸²

5.2.3 *Right to social security and social assistance*

Children with disabilities often find themselves in contexts of extreme poverty which make them 'vulnerable to infection, and less likely to have resistance to illness or access to healthcare. They are more likely to lack clean water and sanitation, and are more exposed to accidents.'⁸³ This is also the case in the South African context.⁸⁴ One way of addressing poverty and its effects is through the provision of social security grants to assist in the provision of basic economic and social needs.⁸⁵

Unfortunately, the African Children's Charter does not contain a provision on the right to social security or even the right to an adequate standard of living.⁸⁶ There is no provision directing the state to provide such needed assistance to children with disabilities.⁸⁷ This omission has been described as 'extremely disturbing', particularly in the African context.⁸⁸

Article 28 of the CRPD provides some cure as it contains a provision on an adequate standard of living and social protection. Here, the CRPD recognises the fact that children with disabilities require a larger income to assist them to develop and grow adequately.⁸⁹ Therefore, article 28 places specific obligations on state parties.⁹⁰

Article 28(1) of the CRPD places an obligation on state parties to recognise that children with disabilities have a right to an adequate

81 Gose (n 34 above).

82 As above.

83 Save the Children (n 67 above) 124. See also World Bank *Convention on the Rights of Persons with Disabilities: Its implementation and relevance for the World Bank* (2007) 15.

84 Save the Children (n 67 above) 124.

85 S Rosa & M Dutschke 'Child rights at the core: The use of international law in South African cases on children's socio-economic rights' (2006) 22 *South African Journal on Human Rights* 231.

86 Gose (n 34 above) 120; Rosa & Dutschke (n 85 above) 231; A Skelton 'Girls' socio-economic rights in South Africa' (2010) 26 *South African Journal on Human Rights* 145.

87 Skelton (n 86 above) 145.

88 Gose (n 34 above) 120.

89 Save the Children (n 67 above) 126.

90 As above.

standard of living which includes access to adequate food, clothing and housing as well as the continuous improvement of their living conditions. States must ensure that this right is promoted without any discrimination on the basis of disability. Article 2 of the CRPD defines ‘discrimination on the basis of disability’ in the following manner:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms ...

Article 28(2) places the obligation on state parties to ensure that the social protection of children with disabilities is recognised and enjoyed without discrimination on the basis of disability. To accomplish this, states must take certain measures which, among other things, include the following: ensuring equal access to clean water and appropriate and affordable services, devices and other assistance to meet disability-related needs; and ensuring access to social protection programmes and poverty reduction programmes. States must also ensure that children with disabilities living in poverty enjoy financial assistance to cover disability-related expenses.

6 Oversight of the implementation of the African Children’s Charter and the CRPD

The implementation of both the African Children’s Charter and the CRPD is overseen by monitoring bodies established by the instruments. The African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee) was established by the African Children’s Charter to promote and protect the rights and welfare of the child.⁹¹ State parties to the Children’s Charter are required to report to the Children’s Committee on the measures they have adopted to give effect to the Children’s Charter and the progress made in the enjoyment of the rights in the Charter.⁹² The Committee on the Rights of Persons with Disabilities (CRPD Committee) was established by the CRPD.⁹³ State parties that have ratified the CRPD are required to submit to the Committee reports on measures taken to give effect to their obligations under the CRPD.⁹⁴

91 Art 32.

92 Art 43.

93 Art 34.

94 Art 35.

6.1 African Committee of Experts on the Rights and Welfare of the Child

In 2013 the South African government submitted its initial report to the African Children's Committee highlighting measures taken to further its obligations under the African Children's Charter.⁹⁵ The report was considered by the Children's Committee, which produced Concluding Observations. The Concluding Observations set out a number of observations on the manner in which the African Children's Charter is being observed in order to protect children's rights. The following was said with regard to the rights of children with disabilities:

- The African Children's Committee noted a number of challenges in efforts made to realise the rights of children with disabilities, including inadequate disaggregated data; barriers to accessing of facilities and social services; poor quality of services to children with disabilities such as rehabilitative services; inadequate integration of the social model in various policies and practices; and limited monitoring frameworks. It recommended that efforts to realise the rights of children with disabilities in line with the African Children's Charter be strengthened.⁹⁶
- The African Children's Committee recommended that South Africa take all necessary measures to ensure the realisation of inclusive education. Such measures must take into account the individual educational needs of children; must cater for children's specific needs by re-evaluating curricula, incorporating special needs education in training of teachers and other personnel involved in education; and providing and improving basic infrastructures suitable to children with disabilities.⁹⁷
- The African Children's Committee urged South Africa to improve the effective implementation of laws, policies, and practices through capacity building and training, that promote substantive equality of children in general, including children with disabilities.⁹⁸
- The African Children's Committee recommended that South Africa provide for care and dependency grants for children with disabilities.⁹⁹

The Concluding Observations challenge and place a responsibility on the South African government to improve services and assistance rendered to children with disabilities and to remove barriers that hinder children with disabilities from fully developing their potential. South Africa recently submitted its second country report to the African Children's Committee

95 Republic of South Africa (2013) 'South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child – Reporting Period: January 2000 – April 2013'.

96 African Committee of Experts on the Rights and Welfare of the Child (2014) 'Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child' para 50.

97 Para 53 African Children's Committee.

98 Para 21 African Children's Committee.

99 Para 41 African Children's Committee.

(for the period May 2013 to May 2016) providing updated information and data on the implementation of policies and legislation on the protection and promotion of children's rights in line with the African Children's Charter. It will be interesting to see how the Committee interacts with this report, particularly in light of its 2014 Concluding Observations.

6.2 Committee on the Rights of Persons with Disabilities

South Africa recently submitted its initial country report to the CRPD Committee.¹⁰⁰ The report acknowledges that

[c]hildren with disabilities remain extremely vulnerable to exclusion, abuse and inequality, particularly in impoverished communities. This is because of failures in the service delivery system, persistent harmful traditional beliefs associated with disability, lack of access to relevant information by parents and families, lack of effective early identification and intervention across sectors for young children, lack of equal access to compulsory education, failure of the judicial system to protect children with disabilities, as well as failure to ensure justice where abuse has occurred, and inadequate training for caregivers working with children with moderate to severe intellectual and/or severe physical disabilities.¹⁰¹

The CRPD Committee is yet to issue Concluding Observations on South Africa's report. It is hoped that the Committee will engage rigorously with the report and produce Concluding Observations that can be used for the improved protection and implementation of the rights of children with disabilities by the state and for advocacy by non-state actors.

7 Conclusion

The African Children's Charter and the CRPD differ but have similar ways of providing protection to children with disabilities. They both have a common goal, which is to provide the most comprehensive and effective protection to children with disabilities. This is borne out by the fact that they require children with disabilities to be treated as rights bearers with dignity and respect, in a non-discriminatory manner that takes into account their views and their best interests.

As regards socio-economic rights, the African Children's Charter appears to provide some of these protections in a general sense, understandably so, since it aims to protect a large group of children, namely, children in the African context. The CRPD, which focuses mainly on persons with disabilities, including children, delves deeper into the

100 Committee on the Rights of Persons with Disabilities consideration of reports submitted by state parties under article 35 of the Convention: Initial reports of state parties due in 2009: South Africa CRPD/C/ZAF/1 (24 November 2015).

101 Para 378 CRPD.

needs of children with disabilities and how the human rights system can promote, protect and assist in the provision of these needs.

Taken together in an interpretively comprehensive manner, the African Children's Charter and the CRPD complement each other in the protection they provide to children with disabilities in South Africa and the broader African context. These two instruments, when viewed as mechanisms aimed at achieving a common goal, may be used to bring substance and content to the socio-economic rights of children with disabilities provided for by national law. South Africa is duty bound to ensure that the rights, including socio-economic rights, of children with disabilities are protected and fulfilled as provided for by both the African Children's Charter and the CRPD.