

The international evolution of the right of children to social security

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Abstract

This article seeks to provide an analysis of the right of children to social security as provided for in the various international legal instruments, and as assimilated in other legal documents. Furthermore, it argues that scarcity of resources prevents children from enjoying socio-economic rights, including the right to social security adopted through international instruments and entrenched in domestic laws. The Convention on the Rights of a Child provides for the right to social security in the event of lack of resources to benefit the child. So does the International Covenant on Economic, Social and Cultural Rights and the African Charter on the Rights and Welfare of the Child. In all the said legal instruments, the clauses on social security do not explicitly prescribe the rights that ought to be promoted through it. However, since the jurisprudence on socio-economic rights emphasises the view that socio-economic rights are interrelated, interdependent and indivisible, it can also be safely said that through social security, beneficiaries, that is children, should be able to enjoy access to other socio-economic rights in general. Therefore, the significance of the right to social security as a means to address poverty and facilitate the development of children is explored.

1 Introduction and historical background

Early systems of what today is known as social security can be traced back to Europe's Middle Ages. The prevalent notion during this era was that of charity, and this was a formal intervention aimed at assisting the poor.¹ It was generally the church that carried out this special duty of providing care to the needy, which mainly included widows, orphans, and the disabled.² As early as the Middle Ages,

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¹Brodman JW 'Charity and welfare: Hospitals and the poor in medieval Catalonia' available at <http://libro.uca.edu/charitycw1> (accessed 2014-06-10).

²*Ibid.*

there existed the realisation that poverty was not merely an economic need, but was a 'form of degradation that rendered the individual vulnerable or dependent'.³ It was during this period that the status of the poor was defined and they were afforded certain legal rights. The needy were normally offered basic assistance in the form of food and shelter. Other benefits extended to the poor included exemption from paying certain fees, and sometimes the provision of free counsel during law suits.⁴

Charity measures were later promulgated into laws. The first codified laws were passed by the English: the so-called 'Poor Laws'.⁵ They were a systematic codification of laws specifically aimed at providing relief to the poor. Like the charitable interventions of the Middle Ages, the provisions of the first Poor Laws were largely influenced by the doctrines of the church. For the English, the influence of the church lingered even after the demise of its influence and the erosion of Christian values. This was due to the fact that they were passed just subsequent to the fall of the monasteries and Christian values that were nevertheless still dominant.⁶ The 'Poor Laws' were passed between 1552 and 1597. In 1601, another 'Poor Law' was passed. The 1601 Poor Law harmonised the earlier 'Poor Laws' and created a uniform national system aimed at providing for the poor.⁷ This group of laws, particularly the 1601 Poor Law, became influential within the Western community, mainly in Europe and the United States of America, and were adopted by various countries in their domestic regulatory frameworks. Later, the 'Poor Laws' were used as the basis for drafting laws to regulate social security benefits.⁸

Although children benefited from the charity interventions and the measures set by the state under the 'Poor Laws', the protection derived was general and therefore inadequate. During this period, children as a class did not have specific rights and therefore had no specific entitlements that could be claimed. Benefits arising from charity could not be claimed, although they could be derived at the mercy of the benefactor. Even with the 'Poor Laws' in place, these laws were designed more to regulate social assistance measures than to entrench enforceable human rights.

The ideology of children's entitlement to social security rights emerged later. It first received attention from the international community after the end of the First World War, in reaction to the catastrophes of the war. Prior to that, theories on the legal standing of children clearly reveal children's lack of autonomy. They

³*Ibid.*

⁴*Ibid.*

⁵The earlier cluster of poor laws included: The Poor Law – 1552 Act; The Poor Law -1563 Act; The Poor Law – 1572 Act; The Poor Law – 1576 Act; The Poor Law –1597 Act; and the 1601 Poor Law.

⁶The Poor Law, available at <http://www.elizabethan-era.org.uk/the-poor-law> (accessed 2014-06-10).

⁷*Ibid.*

⁸Sellers *The Danish poor relief system* (1904) 14.

were viewed only from a 'dependent' perspective and their existence was based only on the adult viewpoint.⁹ Other theories asserted that, because of their vulnerable nature, children need legal protection from adults; while others idealised the relationship between a parent and a child and asserted that, naturally, a parent has the best interests of the child at heart.¹⁰ These approaches deprived children of being bearers of enforceable rights.¹¹

Theories in favour of laws aimed at protecting children's autonomy and their rights argued that in the absence of rights, children do not enjoy dignity and respect.¹² They are relegated to the status of property.¹³ Their defenceless nature induces countless forms of torture and subjects them to the status of victims.¹⁴ Without rights, children lack personality and are used as a means to others' ends.¹⁵ Freeman said the following which signified the status of children at the time: '...when we wish to deny those who have attained chronological adulthood rights we label them children'.¹⁶

The First World War, which ended in 1918,¹⁷ created awareness of the urgent need to protect children, especially upon realising the effects that the War had on them.¹⁸ This period marks a clear shift from the regressive thinking that overlooked the autonomy of children, to a realisation that children have needs and entitlements that arise from their own autonomy, and not reliant on their relationship with an adult. This viewpoint moved children from the level of being 'objects' of charity to being subjects of rights.¹⁹ As rights holders, a window of opportunity emerged and children were expressly protected from catastrophes such as slavery, and arbitrarily being deprived of life.²⁰ The nature of this protection could only be enjoyed through entrenched legal rights.

⁹Alanen 'Theorizing children's welfare' Paper presented at WELLCI Network Workshop 1: New perspectives on childhood, University of Leeds (UK), 12-13 November 2004 available at <http://ciiimu.org/webs/wellchi/reports/workshop> (accessed 2014-06-10).

¹⁰Freeman 'Taking children's rights seriously' (1987-88) 4 *Children and Society* 302.

¹¹Hannan 'Autonomy, well-being and children's rights: A hybrid account' available at http://politicalscience.stanford.edu/sites/default/files/workshop-materials/pt_hannan.pdf (accessed 2014-06-10).

¹²Freeman (n 10) 300.

¹³*Ibid.*

¹⁴*Id* 300-302.

¹⁵*Id* 303.

¹⁶*Ibid.*

¹⁷The First World War began on 28 July 1914 and it ended on 11 November 1918.

¹⁸<http://www.humanium.org/en/childrens-rights-history/references-on-child-rights/geneva-declaration/>. Many children were orphaned by the war, and therefore left without care.

¹⁹Goonesekere and De Silva-de Alwis 'Women's and children's rights in a human rights based approach to development' (UNICEF 2005) 6 available at <http://www.unifem.org/cedaw30/attachments/resources/WomensAndChildrensRightsInAHumanRightsBasedApproach.pdf> (accessed 2014-04-03).

²⁰Dailey 'Children's constitutional rights' (2011) *Minnesota LR* 2100.

The immediate need that emerged subsequent to the First World War was the socio-economic need. Hence, the very first international legal document on children's rights, that is, the Geneva Declaration of the Rights of the Child,²¹ alluded to the concept of social security. The Geneva Declaration of the Rights of the Child was adopted by the League of Nations²² in 1924. The revised version of the Declaration was adopted by all Member States of the United Nations General Assembly, including the then Union of South Africa, in 1959.²³ Although both Declarations were not intended to create binding obligations on State Parties, they nevertheless laid a foundation for the development of international child law and advancement of the right to social security.²⁴ The provisions of the 1924 Declaration tacitly refer to the right to social security and explicitly refer to development in respect of children. Social assistance benefits are implied in article 3 which refers to the obligation of providing a child with relief in times of distress. Although the Declaration does not explicitly provide for the separate strands of social security, namely, social assistance and social insurance, the provision of relief in times of distress is generally provided for in terms of social assistance. The 1959 Declaration contains a similar clause.²⁵ The right to development is expressly provided for in articles 1 and 4 of the 1924 Declaration. Article 1 provides that the child must be given the means requisite for its normal development, both materially and spiritually; while article 4 provides that the child must be put in a position to earn a livelihood (and must be protected against every form of exploitation). The 1924 Declaration however did not really entrench the concept of children's rights. It merely emphasised the obligations that men and women have of ensuring that children are provided for at the optimum level.²⁶ In terms of the Declaration, children were still viewed as recipients of welfare without a reciprocal claim to that welfare.²⁷

The 1959 Declaration of the Rights of the Child refers to the right to social security. It also cites the term 'development'.²⁸ Principle 4 of the Declaration provides that the child shall enjoy the benefits of social security. The same principle further provides that the child shall be entitled to grow and develop in health. He shall also have the right to adequate nutrition, housing, recreation and

²¹The initial draft of the Declaration was done by a British teacher called Eglantyne Jebb. See <http://www.childrensrighswales.org.uk/history-of-children-rights.aspx> (accessed 2014-04-03).

²²The League of Nations is the Intergovernmental Organisation that ended the First World War.

²³The Declaration of the Rights of the Child, General Assembly Resolution 1386 (XIV) of 20 November 1959.

²⁴Kaime 'The foundations of rights in the African Charter on the Rights and Welfare of the Child: A historical and philosophical account' (2009) 3 *African J of Legal Studies* 122-123.

²⁵Principle 8.

²⁶Kaime (n 24) 122.

²⁷*Ibid.*

²⁸The term 'development' is cited under the following principles: principles 2, 4, 6 and 7.

medical services. Principle 6 provides that the child has the right to material security. It also provides that society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Further, that payment of State and other assistance towards the maintenance of children of large families is desirable. Principle 7 provides for the right to free and compulsory education at least during the elementary stages. The paramountcy of the best interests of the child is mentioned more than once in the Declaration.²⁹ It can therefore be safely said that in comparison to its counterpart, the 1959 Declaration birthed the concept of rights in respect of children.

A more general human rights document that also influenced the evolution of the rights to development and social security is the United Nations Universal Declaration of Human Rights.³⁰ Article 22 of the Universal Declaration of Human Rights provides that everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. Article 25 on the other hand is an umbrella provision which guarantees everyone a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to social security in the event of, amongst other things, unemployment or lack of livelihood in circumstances beyond his control. This article also provides that mothers and children are entitled to special care and assistance; and that all children, whether born in or out of wedlock, shall enjoy the same social protection. Article 26 makes provision for the right to education. Like the 1959 Declaration of the Rights of the Child, this Declaration guarantees the right to free education at least during the elementary and fundamental stages. It continues to state that such elementary education shall be compulsory. The article further makes provision for conditional access to higher education.

The United Nations Universal Declaration of Human Rights and both the 1924 and 1959 Declaration of the Rights of the Child, laid a foundation for the advancement of development and social assistance rights of children that followed. It is also noteworthy that in all these three United Nations legal instruments, social security is mentioned in the same breath as economic, social and cultural rights. This therefore underlines linkages between social security, namely social assistance, and the other rights.³¹

²⁹Principles 2 and 7.

³⁰General Assembly Resolution 217 A(III) of 10 December 1948. Hereinafter, the Universal Declaration of Human Rights.

³¹See Mashele and Nkosi 'Gender equality in South Africa: Bridging the divide' in Kierkegaard (ed) *Law, governance and world order* (2012) 437.

Although South Africa was one of the United Nations founding Member States and to an extent incorporated international law into its domestic laws, the racial segregation enforced by the apartheid policy undermined the significance of the United Nations legal instruments. Social security and development rights were only fully enjoyed by the white minority. Consequently, South Africa's so-called commitment to the advancement of International Laws on Human Rights amounted to mere lip service to the said laws.³² The advent of democracy in 1994 ushered a progressive South Africa into the international arena, and she ratified many of international instruments discussed in this article. South Africa's position in relation to the said legal instruments is discussed below.

2 International and regional instruments and the right to social security

This section maps out an overview of both the international and regional instruments and the provisions on social security, including those that relate to social assistance and development of children. The interpretations of these provisions will be examined in the subsequent section.

2.1 *United Nations Convention on the Rights of the Child*³³

While the 1959 Declaration is hailed for laying the foundation for the advancement of children's rights, the manner in which it was formulated could not have resulted in it being a binding legal document for States.³⁴ Secondly, with the passage of time, the interests of children became more diverse and were no longer reflected adequately in the 1959 Declaration.³⁵ There was therefore a need for the Declaration to be revised. In 1978, Poland, the country that consistently propagated a State-binding children's rights document, issued the first draft of the proposed document, which later became the 1989 United Nations Convention on the Rights of the Child (CRC).

Unlike its predecessors,³⁶ the CRC imposed binding obligations on its Member States, of which South Africa is one. South Africa signed the CRC on 29 January 1993 at the inception of Democracy, and ratified it on 16 June 1995. South Africa's commitment to international children's rights is also reflected in the

³²*Ibid.*

³³Adopted by the UN General Assembly in 1989 and was entered into force in 1990. Hereinafter, the CRC.

³⁴Kaime (n 24) 122.

³⁵Ruppel 'The protection of children's rights under international law from a Namibian perspective' in Ruppel (ed) *Children's rights in Namibia* (2009) 55.

³⁶The 1924 Declaration of the Rights of a Child and the 1959 Declaration of the Rights of a Child.

country's Constitution.³⁷ Section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.

The CRC is founded on the following four principles: the right to equality,³⁸ the best interests of the child,³⁹ the right to life and development,⁴⁰ and respect for children's own views.⁴¹ The CRC further categorises the rights into the following clusters: general measures of implementation; definition of a child; general principles; civil rights and freedoms; family environment and alternative care; and basic health and welfare. According to Ruppel, the aforementioned classification is relevant for the purposes of communication between Member States and the Committee on the Rights of the Child.⁴² The right to social security and child care services and facilities is included under the cluster of basic health and welfare. Other rights in this cluster include: the right to survival and development, the right to special protection of children with disabilities, the right to health and health services and the right to an adequate standard of living. Although the CRC identifies only four articles as its principles, and clusters its rights, it recognises that the rights in the Convention are indivisible and interrelated and a holistic approach should be adopted when dealing with children's rights.⁴³

The indivisibility and interrelatedness of rights stand to present a valuable discourse on the relationship between social security rights, particularly, the right to social assistance and other rights contained in the CRC. The right to social security is premised on poverty and poverty impacts on other guaranteed rights, such as the right to education and the right to the highest attainable standard of health.⁴⁴ This further affirms that the right to social security cannot be viewed in isolation of other rights.

2.2 *ILO Social Security (Minimum Standards) Convention*⁴⁵

The International Labour Organisation (ILO) Social Security (Minimum Standards) Convention provides valuable insight on the content of the right to social assistance. South Africa has not ratified the ILO Social Security (Minimum

³⁷The Constitution of the Republic of South Africa, 1996.

³⁸Article 2.

³⁹Article 3.

⁴⁰Article 6.

⁴¹Article 12.

⁴²Ruppel (n 35) 58.

⁴³Ruppel (n 35) 58.

⁴⁴Howe and Covell 'Child poverty in Canada and the rights of a child' (2003) 25 *Human Rights Quarterly* 1077.

⁴⁵102 of 1952. The Convention was adopted in 1952 and came into force in 1955.

Standards) Convention and is therefore not bound by its provisions. However, because of the Convention's unambiguous provisions on social security, it is worth considering. Its provisions provide guidelines on what the right to social security entails.

The basis of the ILO Convention is labour-related social security benefits. However, as stated earlier, the Convention nonetheless provides insight even on social assistance benefits, particularly, on what they entail. The Convention classifies social security benefits into branches, namely: medical care; sickness benefit; unemployment benefit; old-age benefit; employment injury benefit; family benefit; maternity benefit; invalidity benefit; and survivors' benefit.⁴⁶ Pertinent to this study are the guidelines that the Convention provides in respect to family benefit. Family benefit in this context is read to include benefits aimed at children. The content of the provision of family benefit, as stated in the Convention, is: a periodical payment granted to any person protected and having completed the prescribed qualifying period; or the provision to or in respect of children, of food, clothing, housing, holidays or domestic help; or a combination of both the aforesaid.⁴⁷ This content is substantial and quite significant in the analysis of children's rights to social security, particularly those that belong to the category of social assistance.

2.3 International Covenant on Economic, Social and Cultural Rights⁴⁸

The United Nations adopted the ICESCR in 1966 which entered into force in 1976. South Africa signed the ICESCR in 1994, but it has not yet been ratified. In 2012 South Africa's Cabinet announced that the ratification of the ICESCR is to be tabled before parliament.⁴⁹ Because of South Africa's legitimate intention of becoming a member state to ICESCR, its provisions on the right to social security and development are worth considering.

Article 9 of the ICESCR provides that States Parties to the present Covenant recognise the right of everyone to social security, including social insurance. The right to social security is said to be vital in the realisation of many other rights in

⁴⁶ILO http://www.ilo.org/secsoc/areas-of-work/legal-advice/WCMS_205340/lang--en/index.htm (accessed 2014-04-03).

⁴⁷Article 42(a)-(c).

⁴⁸Adopted by the UN General Assembly in 1966 and was entered into force in 1976. Hereafter, the ICESCR.

⁴⁹Republic of South Africa: Department of Government Communications and Information Systems 'Statement on Cabinet meeting of 10 October 2012' <http://www.gcsi.gov.za/content/newsroom/media-releases/cabstatements> (accessed 2014-03-12).

the Covenant.⁵⁰ This reinforces the assertion of interrelatedness and indivisibility of rights. Article 10 provides that widest possible protection and assistance should be afforded to the family.⁵¹ It further provides that special protection should be given to mothers, for a reasonable period, before and after childbirth. The said mothers should be allowed paid leave or leave with adequate social security benefits.⁵² Article 11 recognises an individual's and family's right to an adequate standard of living including adequate food, clothing, housing and continuous improvement of living standards. The State Parties are required to take appropriate steps to ensure the realisation of these rights. Article 13 recognises the right to education. In terms of article 13, education shall be directed to the full development of the human personality and the sense of its dignity. Further, it shall strengthen the respect of human rights and fundamental freedoms.

Article 9 is worth noting. It recognises the relationship between the right to social security and other rights. Article 9 acknowledges that the realisation of the right to social security cannot occur in isolation from other socio-economic rights, as all these rights are, as stated above, interrelated and indivisible; and pertinent to the holistic development of beneficiaries.

2.4 African Charter on the Rights and Welfare of the Child⁵³

The Organisation of African Unity (now the African Union) adopted the ACRWC in 1990, and entered into force in 1999. South Africa signed the ACRWC in 1997, and ratified it in 2000. The approach adopted by the ACRWC in the advancement of children rights is somewhat different from that of the United Nations Conventions.

Although many African States are signatories and Member States to the United Nations Conventions aimed at protecting and promoting children's rights, there was a realisation that the United Nations Conventions, firstly, did not reflect in their provisions, African cultural heritage,⁵⁴ which is considered imperative in postulating children's rights. Secondly, the impact that factors of socio-economic, cultural, traditional and developmental circumstances, exploitation and hunger, had on children in the African continent, was not reflected in the United Nations

⁵⁰Committee on Economic, Social and Cultural Rights, General Comment 19, The right to social security (art 9) (39th session, 2007), UN Doc E/C 12/GC/19 (2008) <http://www.globalhealthrights.org/instrument/cescr-general-comment-no-19-the-right-to-social-security> (accessed 2014-03-12).

⁵¹Article 10(1).

⁵²Article 10(2).

⁵³OAU Doc CAB/LEG/24.9/24.9(1990). Hereafter the ACRWC.

⁵⁴Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 21.

Conventions.⁵⁵ The two stated positions had a great influence on the adoption of the ACRWC.

The ACRWC does not contain an express provision on social security. It does however contain provisions on other socio-economic rights relating to children, and because of the link between the right to social security and other rights,⁵⁶ the ACRWC provisions in as far as they are relevant to the development of the child, are worth noting. The interpretation adopted by the African Commission on Human and Peoples' Rights in respect of the omission of the right to social security in the African Charter on Human and Peoples' Rights,⁵⁷ may also be applied in explaining the omission of the same right in the ACRWC. The Commission asserted that the right to social security is implied in the ACHPR, and is derived from the collective reading of articles 4, 5, 6, 15, 16 and 18. The aforesaid articles make provision in respect of the rights to life; dignity; liberty; work; health; protection of the family, the aged and persons with disabilities.⁵⁸

Article 20 of the ACRWC stipulates parental responsibilities.⁵⁹ Within this framework of parental responsibilities, article 20 further provides that Member States, taking into account their economic and national conditions, shall, where there is a need, take appropriate measures to assist parents, including other caregivers of the child. Such measures include providing material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing.⁶⁰ Member States shall also establish institutions responsible for providing care to children,⁶¹ and ensure that the children of working parents are provided with care services and facilities.⁶²

Article 11 provides for the right to education. It provides that education of the child, shall, among other things, be directed to the promotion and development of the child's personality, talents and mental and physical abilities to their fullest

⁵⁵Njungwe 'International protection of children's rights: An analysis of African attributes in the African Charter on the Rights and Welfare of the Child' (2009) 3 *Cameroon J on Democracy and Human Rights* 11.

⁵⁶Nkosi 'An analysis of the South African social assistance system as it applies to children in rural communities: A perspective from the *Grootboom* case' (2011) 26 *SAPL* 90. See also Mirugi-Mukundi *Realising the social security rights of children in South Africa, with particular reference to the Child Support Grant* (2009) Research report written for the Socio-Economics Rights Project of the Community Law Centre 28 available at www.communitylawcentre.org.za (accessed 2014-03-12).

⁵⁷OAU Doc CAB/LEG/67/3 rev 5, 21ILM 58 (1992). Hereafter the ACHPR.

⁵⁸Ssenyonjo 'Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter' 378 available at www.corteidh.or.cr/tablas/r26994.pdf (accessed 2014-03-12).

⁵⁹Article 20(1)(a)-(c).

⁶⁰Article 20(2)(a).

⁶¹Article 20(2)(b).

⁶²Article 20(2)(c).

potential;⁶³ and the promotion of children's understanding of primary health care.⁶⁴ In realising the right to education, Member States are required to take appropriate measures and provide, amongst other things, free and compulsory basic education;⁶⁵ promote access to secondary education and progressively make it free and accessible to all;⁶⁶ make higher education accessible to all on the basis of capacity and ability by every appropriate means;⁶⁷ and take measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.⁶⁸

3 Interpretation of the right to social security within the international framework

Although the discourse on social security rights is advancing, the content of what these rights entail is still debatable. In an attempt to explain or rather outline the content of the right to social security, an analysis of the concept of social security will be conducted. Furthermore, an exploration of the provisions contained in the legal instruments outlined above, and other legal documents, will be made in this section.

3.1 *The concept of social security*

The evolution of anti-poverty strategies within the socio-economic rights discourse led to the adoption of various concepts which are generally deemed to be similar. These include: social security; social insurance; social protection; social welfare; and social safety net. For the sake of totality, the relationship between these concepts and/or the contexts within which they are generally used will be explained below.

Social security is said to be 'the state-based system of entitlements linked to what are often called *contingency risks*'.⁶⁹ Social insurance can be said to operate within the scope of social security. Social insurance refers contributions that arise from an employment setup, aimed at covering certain risks in case they arise. It is also used in the context of social solidarity in that social insurance contributes to the benefits of the less fortunate.⁷⁰ The system of social insurance can yield optimal benefits in a state where there are favourable employment

⁶³Article 11(2)(a).

⁶⁴Article 11(2)(h).

⁶⁵Article 11(3)(a).

⁶⁶Article 11(3)(b).

⁶⁷Article 11(3)(c).

⁶⁸Article 11(3)(e).

⁶⁹Standing 'Social Protection' (2007) 17 *Development in Practice* 512.

⁷⁰Standing (n 69) 513.

opportunities, and contributions can be made and equitably distributed among the privileged and those less privileged.⁷¹

Social protection may be said to be synonymous with social security as defined in the South African context in that it also has two strands, namely, social insurance and social assistance.⁷² Standing explains social protection as broad in that it signifies ‘the full range of protective transfers, services, and institutional safeguards supposed to protect the population “at risk” of being “in need”’.⁷³ Carmona asserts that while social protection measures vary according to their objectives, design and level of development of applicable countries, social protection plays a significant role in alleviating poverty and facilitating development.⁷⁴

The term social safety net is also used in the social security discourse. Social safety nets refer to measures used by governments to ‘catch’ the poor and prevent them from falling below a certain poverty line, and assist them in bouncing back. Standing points out that the term is problematic because based on the nature of a net, not everyone can be caught by a net, and some will fall through and not be rescued.

Another term that is generally used is welfare. Traditionally, the term welfare refers to the state of social well-being, contentment and prosperity.⁷⁵ When used within the context of a welfare state, it refers to the economic, social and political well-being of the nation.⁷⁶ In the context of a welfare state, welfare is said to safeguard the market economy, at the same time protecting market-oriented individuals against contingency losses.⁷⁷

However, in contemporary discourses, the term welfare is usually equated to charity and/or social assistance programmes.⁷⁸ It is also used in reference to: health; statutory procedures or social efforts designed to promote the basic physical and material well-being of people; systems aimed at promoting social well-being and alleviate social distress; forms of assistance that have the child’s best interests at heart; or educational, cultural, medical, and financial assistance to the poor.⁷⁹

⁷¹ *Ibid.*

⁷² United Nations ‘Report of the independent expert on the question of human rights and extreme poverty’ 2010 A/65/259, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.34.Add.2_en.pdf (accessed 2014-06-10).

⁷³ Standing (n 69) 512.

⁷⁴ Carmona (United Nations Special Rapporteur on extreme poverty and human rights) ‘The need to include a rights-based approach to social protection in the post-2015 development agenda’ (nd) available at www.ilo.org/wcmsp5/groups/public (accessed 2014-06-12).

⁷⁵ Midgley *Social development: The developmental perspective of social welfare* (1999) 13.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Standing (n 69) 512.

⁷⁹ Alanan (n 9).

In certain contexts, the term welfare had a derogative connotation and was associated with 'dependency'.⁸⁰

3.2 Interpretation of the concept social security within the international legal instruments

An observation made from the legal instruments and other legal documents is the interchangeable use of the concepts of social security, social welfare and social assistance, and sometimes, even social protection. Some legal instruments use the term social security which encompasses both social assistance and social insurance without expressly specifying any of these two strands. It is only with further reading of the content of the provisions that the strand of social security referred to can be ascertained.

In order to further expand on the assertion that the context within which the concept 'social security' is used can be ascertained from a holistic reading of the provisions of the legal instrument, Levine and Veerman⁸¹ make the following submission. In their paper, they view article 27 of CRC as an expansion of the provision made in article 26. Article 26 provides that State Parties shall recognise for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law. It further provides that the benefits should, where appropriate, be granted, taking into account the resources and circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other considerations relevant to an application for benefits made by or on behalf of the child.

According to Levine and Veerman, the purpose of article 27 is to explain the responsibilities entailed in article 26, and these are: State Parties must recognise the right of a child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development; State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in cases of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing; furthermore, State Parties shall take all appropriate measures to ensure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child.

⁸⁰Standing (n 69) 512.

⁸¹Levine and Veerman 'Government obligation to provide access to social security for children of minority ethno-linguistic groups: The case of Arab children in Israel' (2001) 9 *The International J of Children's Rights* 273-274.

A similar observation is also made from the Constitution of the European Union.⁸² The Constitution⁸³ makes provision for social security and social assistance. Article 94 provides that the Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.⁸⁴ It further provides that everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.⁸⁵ Article 94(3) makes specific reference to poverty. It provides that in order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices. The content of and the context within which the right to social security is used is drawn from the subsequent subsections. However, the provisions of article 94 raised other criticisms which are relevant for the purposes of this discussion. These relate to the standard or level of protection that arise from the right to social security. The basis of the criticism is, firstly, that article 94 does not define a required minimum level of protection for social security and social assistance.⁸⁶ Secondly, EU Member States have different policies on social security and social assistance at national level, therefore article 94 is subject to different interpretations by Member States.⁸⁷

The First United Nations Conference of Ministers of Social Welfare held in 1968 attempted to provide some insight on the subject.⁸⁸ Organisations that participated in the planning of the conference include: the UN Children's Fund; the International Labour Organization; the World Health Organization; and the World Food Programme.⁸⁹ Eighty-seven nations worldwide were represented at

⁸²Hereafter, the EU, which comprises France, Germany, Belgium, the Netherlands, Italy, Luxembourg, Denmark, Ireland, United Kingdom, Greece, Spain, Portugal, Austria, Finland, Sweden, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

⁸³The Constitutional Treaty, 2004. It was signed by the 25 Member States of the European Union on 29 October 2004.

⁸⁴Article 94(1).

⁸⁵Article 94(2).

⁸⁶Victor 'Social security and social assistance in the treaty establishing a Constitution for Europe: Article 94, what is really protected?' (2004) 18 *Emory ILR* 783-784.

⁸⁷Victor (n 86) 764.

⁸⁸Cohen and Lally 'International social welfare: A report on the First UN Conference of Ministers of Social Welfare' (1969) 7 *Welfare Rev* 3.

⁸⁹*Id* 2.

this conference.⁹⁰ The primary purpose of the conference was 'to examine the role of social welfare functions common to all nations'.⁹¹ In examining this role, concerns about what social welfare entailed were raised. One of the initial viewpoints was that it was necessary to define social welfare in order to properly locate it within social policies.⁹² Delegates raised different viewpoints in response to this concern. While there were those who felt that a definition was necessary, some felt that a definition would set limits to the dynamic nature of social welfare.⁹³ Although no definition was eventually arrived at, the following principles were adopted in respect of social welfare: 'social welfare should ensure that no person is left behind in the process of development and that no one is permitted to fall below the social standards that are every man's right, and social welfare should be fully represented in national planning'.⁹⁴ Delegates further recognised the role of social welfare in the development of policies for health; housing; education; training and employment; and population.⁹⁵ According to the guidelines provided above, no parameters are set for the concept social welfare, particularly within the scope of social security.

The complex nature of the rights to social security, social assistance and social welfare has also resulted in the international community relying on various interpretations for guidance on what these rights entail. The noticeable trend is that the international community operates within the broad framework of what social security and social assistance entail and they set their own thresholds on how they intend to realise these rights.

The ILO Social Security Convention,⁹⁶ also, although not purposed to lay down an international standard for the content of social security rights, nevertheless stipulates principal benefits that ought to be part of social security.⁹⁷ These include: provision of a basic income to all in need of such protection; comprehensive medical care; provision for child welfare and maternity protection; provision of adequate nutrition, housing and facilities for recreation and culture; and the assurance of equality of educational and vocational opportunity.⁹⁸ According to Meknassi⁹⁹ social security cannot be viewed in isolation of the principal objective,

⁹⁰ *Id* 1.

⁹¹ *Ibid*.

⁹² *Id* 4.

⁹³ *Id* 2.

⁹⁴ *Id* 4.

⁹⁵ *Ibid*.

⁹⁶ ILO Social Security (Minimum Standards) Convention 102.

⁹⁷ Meknassi 'Extending social security in the developing countries: Between universal entitlement and the selectiveness of international standards' (2005-2006) 27 *Comp Labor Law and Pol'y Journal* 207.

⁹⁸ Meknassi (n 97) 209.

⁹⁹ *Ibid*.

that is, full employment, adequate standards of living and development. The realisation of these rights will, in turn, ensure economic security; the rights to dignity, freedom, and equality of opportunity of all workers.¹⁰⁰

There is also a viewpoint that although there may be guidelines stipulating what social security and social assistance encompass, these cannot be hard and core. They ought to be flexible.¹⁰¹ The content and implementation measures of social security and social assistance rights should primarily be informed by socio-economic conditions prevalent in a particular country.¹⁰² However, minimum requirements still ought to be observed in aiming at progressive realisation of these rights.¹⁰³ The minimum standards set include: a minimum level of benefits to be paid in case of occurrence of one of the contingencies; the percentage of the population to be at least protected in case of occurrence of one of the contingencies; and the conditions for and periods of entitlement to the prescribed benefits.¹⁰⁴

The minimum requirements are propagated through the ILO Social Protection Floors Recommendation,¹⁰⁵ which resulted from consensus of governments, workers' and employers' organisations of the 185 ILO Member States. The ILO Social Protection Floors Recommendation promotes implementation of at least minimum standards by Member States.¹⁰⁶ The ILO defines Social Protection Floors as

nationally defined sets of basic social security guarantees that should ensure, as a minimum, that over the life cycle, all in need have access to essential health care and to basic income security which together secure effective access to goods and services defined as necessary at the national level.¹⁰⁷

Scholars hold different viewpoints on the question of minimum requirements. Wabwile,¹⁰⁸ for instance asserts that varying standards should be set for

¹⁰⁰ *Ibid.*

¹⁰¹ Cantillon 'Belgian social federalism: Quo vadis?' (2013) available at http://www.centrumvoorsociaalbeleid.be/sites/default/files/Research_Paper_3-2013_Cantillon.pdf (accessed 2014-03-12).

¹⁰² See different socio-economic conditions classified in terms of developing and developed countries.

¹⁰³ The ILO Social Security (Minimum Standards) Convention, available at <http://www.ilo.org> (accessed 2014-03-12).

¹⁰⁴ *Ibid.*

¹⁰⁵ 202 of 2012.

¹⁰⁶ ILO 'The strategy of the International Labour Organization, social security for all: Building social protection floors and comprehensive social security systems' (2012), available at <http://www.ilo.org> (accessed 2014-03-12).

¹⁰⁷ *Ibid.*

¹⁰⁸ Wabwile 'Implementing the social and economic rights of children in developing countries: The place for international assistance and cooperation' (2010) 18 *International Journal of Children's*

developing and developed countries. These varying standards will ensure that developing countries, because of their developing economies, in meeting their international obligations, can apply only the minimum standards of social security rights in their respective countries.¹⁰⁹ Developed countries, on the other hand, are expected to observe higher standards, as dictated by their economic status. Wabwile is of the viewpoint that the provision of social security and social assistance to the needy is dependent on the availability of resources and redistribution of income.¹¹⁰ It is, however, still difficult to ensure sustainable advancement of the poor, in this respect, children, if an exposition of minimum or higher standards is generalised. It is argued that it is generalised because, unlike the guidelines offered by the ILO in the above discussion, the content of minimum and maximum standards have not been clearly outlined. High expenditure on social security and social assistance measures, on its own, does not necessarily guarantee that poverty is addressed effectively and in a sustainable way. Hence the general argument that welfare creates poverty,¹¹¹ stemming from the viewpoint that social assistance, in the form of cash transfers, in particular, does not foster economic independence; in fact, it deskills the masses and breeds a culture of dependency.¹¹² Although high expenditure on social security generally represents more coverage, the outcomes of social security cannot be determined only on the basis of expenditure. The manner in which social security benefits are structured is also crucial. Valuable lessons can be drawn from welfare countries like Denmark and other Scandinavian countries in this regard. These countries, like many other countries in Europe, have social assistance programmes in place aimed at ensuring that their people, including poor children, have a chance of accessing and enjoying a wide range of welfare benefits, which create a safety net and they are therefore protected from the trap of poverty. Unlike countries with developing economies, infrastructure in terms of health care, the education system and other services are generally well developed. For developed economies it makes no difference in terms of impact, whether social security measures exist in collaboration with other rights or services, because either way, the infrastructure is intact and international obligations in respect of addressing poverty are generally met. It can therefore be argued that developed countries, because of their strong economies, observe higher standards in respect of their social security and social assistance programmes. Also impressive are these

Rights 365.

¹⁰⁹*Ibid.*

¹¹⁰*Ibid.*

¹¹¹Bradshaw 'Theories of poverty and anti-poverty programs in community development' (2006) Rural Poverty Research Center Working Paper no 06-05 at 6, available at <http://www.rprconline.org> (accessed 2014-03-12).

¹¹²*Ibid.*

countries' performances in ensuring that rights, such as the right to education, health care and housing, are accessible. But the question is: are these standards higher than they are different?

In the case of South Africa, for instance, it is a country with a developing economy. The state nonetheless is planning to invest approximately R16, 5 million during the fiscal years 2016-2017 in monetary social grants for children living in poor families or care structures.¹¹³ When dispensed to individual families, the amount translates to a mere R310-R320 a month. It is said that this amount cannot even afford the family a daily loaf of bread for the period of a month – forget about other basic necessities. In the same vein, rights such as the right to education, health care and housing cannot be adequately accessed due to, amongst others, poor infrastructure, poor service delivery, and to an extent, financial constraints. South Africa's standards in meeting the needs of poor children can indeed be said to be low and minimal.

However, they are not minimal solely because of known economic constraints that define a developing country, but they are also minimal because of inadequate government systems. For instance, imagine what the country could achieve in capacitating poor children if, over and above the dispensing of social assistance grants, our social security infrastructure was also enabling adequate access to socio-economic services such as education and health care. Within the confines of the economy of a developing country, the investment in the lives of South Africa's poor children would still be worthwhile.

The Committee on Economic, Social and Cultural Rights¹¹⁴ provides a detailed comment on the nature of the right to social security and the manner in which this right can be realised. Although critics have raised a valid question as to whether the interpretation of the right to social security as provided by the Committee is the only legitimate version.¹¹⁵ Another question in this regard is whose viewpoint the Committee brings across in its interpretative process, particularly because no reference is made to any particular existing case.¹¹⁶ Nevertheless, it is generally accepted that the Committee 'has express authority from States to develop General Comments in order to give them guidance on their substantive obligations under the ICESCR'.¹¹⁷

¹¹³Minister of Finance Pravin Gordhan 2014 Budget Speech, available at <http://www.treasury.gov.za/documents/national%20budget/2014/speech/speech.pdf> (accessed 2014-03-12).

¹¹⁴Hereafter, the Committee. General Comment 19, The right to social security (art 9) (39th session, 2007), UN Doc E/C 12/GC/19 (2008) INK "<http://www1.umn.edu/humanrts/gencomm/escgencom19.html>" <http://www1.umn.edu/humanrts/gencomm/escgencom19.html> (accessed 2014-03-12).

¹¹⁵Langford 'The right to social security and implications for law, policy and practice' 32 available at <https://www.jus.uio.no/.../3%20Langford%20Right%20to%20Social%20Security.pdf> (accessed 2014-03-12).

¹¹⁶*Ibid.*

¹¹⁷*Ibid.*

According to the Committee, the right to social security includes the right to access and maintain benefits aimed at protecting beneficiaries from economic contingencies that may arise as a result of, but not limited to, unemployment; sickness; disability; maternity; old age; death of a family member; unaffordable access to health care; insufficient family support, particularly for children and adult dependents.¹¹⁸ With respect to family and child support, the Committee stated that State Parties should consider the resources and circumstances of the child and his or her primary caregiver, and with those considerations, provide benefits, including cash benefits and social services to those families in need. Benefits and social services would ordinarily include: food, clothing, housing, water and sanitation, or other rights as appropriate.¹¹⁹ Social security therefore plays an important role in reducing and alleviating poverty. It also prevents social exclusion that is generally a consequence of poverty.

While the Committee acknowledged that elements of the right to social security are primarily determined by prevailing socio-economic conditions, it explained the normative content of the right to social security.¹²⁰ The Committee stated that the right to social security includes: the right not to be arbitrarily and unreasonably restricted from existing social security coverage; and the right to equal enjoyment of adequate protection from social risks and contingencies.¹²¹

Furthermore, the Committee makes provision for core obligations of State Parties. The core obligations of State Parties include: the duty to ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic education. It also provides that if a state party, within its available resources, cannot provide the said minimum level for all the risks and contingencies, it may, after consultation, select a core group of social risks and contingencies that it is able to meet and relieve.¹²² State Parties also have an obligation to: ensure that the disadvantaged and marginalised can enjoy access to social security systems and schemes on a non-discriminatory basis in respect of race, sex, marital status, disability, and age, amongst others;¹²³ adopt and

¹¹⁸Paragraph 2. General Comment 19, The right to social security (Art 9) (39th session, 2007), UN Doc E/C 12/GC/19(2008) <http://www1.umn.edu/humanrts/gencomm/escgencom19.html> (accessed 2014-03-12).

¹¹⁹Paragraph 18. General Comment 19 INK “<http://www1.umn.edu/humanrts/gencomm/escgencom19.html>” <http://www1.umn.edu/humanrts/gencomm/escgencom19.html> (accessed 2014-03-12).

¹²⁰Paragraph 9. General Comment 19 <http://www1.umn.edu/humanrts/gencomm/escgencom19.html> (accessed 2014-03-12).

¹²¹*Ibid.*

¹²²Paragraph 59. General Comment 19 <http://www1.umn.edu/humanrts/gencomm/escgencom19.html> (accessed 2014-03-12).

¹²³*Ibid.*

implement a national social security strategy and a plan of action;¹²⁴ take targeted steps to implement social security schemes, particularly those that protect the disadvantaged and the marginalised;¹²⁵ and to monitor the extent of the realisation of the right to social security.¹²⁶

In advancing the assertion that international and national anti-poverty policies should adopt holistic approaches in addressing poverty, the Committee on Economic, Social and Cultural Rights explains the core obligations of States in respect of poverty as cutting across economic, social and cultural rights. And that the realisation of these rights as a group, even at a minimum level, should set a threshold in setting standards for State Parties.¹²⁷

States therefore, particularly the developing countries, need to begin to strategically plan on how expenditure directed at developing poor children can be used to break the cycle of poverty and yield sustainable long-term results. This process requires states to also have a plan to mitigate unintended consequences by building concomitant infrastructures and systems to cope with expansion.

4 Conclusion

International instruments provide the scope for the interpretation of the right to social security. Although international instruments use the terms social security, social protection, social assistance, social welfare and safety nets interchangeably, the context within which each term should be understood can generally be obtained from a detailed reading of the instruments' provisions. Social security is a useful measure that is generally resorted to in addressing poverty. However, what can be deduced from the international instruments is that social security interventions, particularly the non-contributory ones, cannot be viewed in the same vein as charity. Because of its nature, charity may be limited in scope and is likely to yield only short-term benefits.

According to the international discourse, while social security measures do satisfy the immediate needs of the poor, they should also be linked to developmental strategies which provide children with a window of opportunity to escape poverty. The virtuous cycle of development which illustrates the benefits of health and education to a child's development is explained above.

Although there are certain standards recommended as a threshold for social security or social assistance offered by the states, an inference can be made that economic and other conditions play a role in determining the nature of social assistance and the welfare system adopted by a particular country.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Skogly 'Is there a right not to be poor?' (2002) 2 *Human Rights LR* 78.