

**A CONSTITUTIONAL FRAMEWORK FOR CHILD CARE
PROVISION IN SOUTH AFRICA FROM A GENDER PERSPECTIVE**

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Abstract

This study argues that child care is a constitutional right. The right to equality and the right to citizenship can and should be used to found a claim for child care provision.

The study examines the issue of child care from a gender perspective. It finds that women take the major responsibility for the care of children. This prevents many women from participating in the economy and in the civic and political life of the country. The lack of involvement by men in child care also inhibits men from developing fully as people. Child care provision can assist women practically to alleviate disadvantage but is also a critical mechanism for the transformation of gender relations in society.

The study examines the history and extent of child care in South Africa as well as laws and government policies dealing with child care. It considers certain proposals to address the child care situation and the position in other countries.

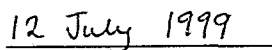
The study finds that in order to provide adequate child care in South Africa, a choice between competing policy frameworks and resource priorities will have to be made. This study does not attempt to make these choices. It argues, however, that *constitutional litigation* could be used as one of the means of requiring the government and private sector to address the lack of child care in South Africa. Such litigation could generate a rights framework within which the state would be required to frame its child care policy.

Declaration

I declare that this dissertation is my own unaided work. It is being submitted for the degree of Master of Laws at the University of the Witwatersrand, Johannesburg.

A handwritten signature in cursive script, appearing to read 'Beth Goldblatt', is written over a horizontal line.

Beth Goldblatt

A handwritten date '12 July 1999' is written over a horizontal line.

Date

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CHAPTER ONE: INTRODUCTION

1.1 RESEARCH FRAMEWORK AND FINDINGS

There is systemic gender inequality in South African society. The responsibility for providing and arranging for child care falls largely on women due to the sexual division of labour and women's location within the private sphere of society. This responsibility constrains women's development and full participation in many aspects of social life. The non-involvement of men in child care also prevents men from developing to their full potential.

National Party governments provided little regulation or provision of child care. Where they did provide child care, such services were racially skewed in favour of Whites. The current government has committed itself to increasing child care provision but has not developed a coherent approach to achieving this. Nor has it allocated meaningful resources towards fulfilling this commitment. This reflects a failure to give priority to the needs of women, even within the context of the government's strained finances.

The Bill of Rights and the Constitution as a whole promise the establishment of a society, different from the past, wherein all South Africans are able to enjoy democracy, social justice and human rights. Based on a transformative interpretation of the equality and citizenship rights, the study finds that the provision of child care to enable women to participate equally as full citizens of South Africa, is a constitutional right. The improved provision of child care should also contribute towards the transformation of gender relations in South African society.

1.2 RESEARCH RATIONALE

South African women have to take the primary responsibility for child rearing, household reproduction, child care arrangements and often, financial support for the household, without significant assistance from the state, the workplace or men. As a result, their ability to participate fully in the economy and the society as a whole is severely restricted. This situation is the result of unequal gender roles in our society which place the responsibility for children on women. The situation is made worse by the disproportionate burden of poverty carried by most South African women.

1.2.1 Access to child care

There is very little formal child care available in South Africa. The number of children with access to some form of non-family child care in South Africa is somewhere between 6% and 21%¹ with rural Africans having the least access to such facilities. The analogy of access to water is apposite here. Every South African has access to water - if they did not they would die. But what type of access do they have, what is the quality of the water they have access to, and what is the cost to themselves in accessing water? Similarly with child care, particularly for infants and toddlers, someone is looking after these children because without some care they would not survive. But what type of care are they receiving and at what cost to their carers whose opportunities for economic survival are in all likelihood being severely constrained.

1.2.2 Responsibility for child care

A large number of South African households are women-headed (as much as 41% of African households).² Women-headed households are generally poorer than male-headed ones.³ Large numbers of women live without the fathers of their children and bear primary responsibility for child care and support of children. Often, because of high rates of teenage pregnancy, the actual carers of these children are grandmothers or other female relatives of the children. Often, older sisters care for younger children, which has an adverse effect on their educational and other life chances.

1.2.3 Economically active women

Most women in South Africa do not earn any income (only 46% of South African women over the age of 15 are economically active, as opposed to 63% of men). Women in rural areas are even

¹ See below at 2.1.3.

² Budlender, D (ed) (1996) The Women's Budget, Cape Town: Idasa, at 45.

³ Government of the Republic of South Africa (1998) Convention for the Elimination of all Forms of Discrimination Against Women: First South African Report, Pretoria: Government of the Republic of South Africa, at 1-4, hereinafter referred to as the 'CEDAW Report'.

more unlikely to earn anything (only 38% of these women are economically active).⁴ Of the economically active women, a high proportion have no formal employment (38% overall, and 47% of all economically active African women). Most self-employed African women are engaged in “‘elementary’ occupations such as street vending, domestic work and scavenging”.⁵ The vast majority of employed women tend to be engaged in low earning, insecure forms of employment without benefits. While some of these jobs (such as street vending) allow women to take their children with them to work, many jobs (such as domestic work) require women to leave their children elsewhere.

1.2.4 Women and poverty

Unemployed women have to look for work opportunities while caring for children or have to give up these opportunities when they cannot make satisfactory child care arrangements. The lack of employment for women in rural areas means that mothers are available to look after children during the day. But, the lack of water, fuel and other resources means that these women have to spend many hours away from the home in accessing these resources and thus cannot provide proper care to children. At the same time, their responsibilities for child care impact on their ability to engage in these subsistence activities. In rural areas, most African households (55%) use wood for cooking fuel. Over half of these households have to travel more than one kilometre to gather this wood.⁶ Between 12 and 14 million South Africans do not have immediate access to clean water. It is mostly women in rural households who spend more than four hours a day collecting water and wood.⁷ Small children cannot walk or be carried over these distances. Their mothers have to make arrangements to leave them in the care of others, where such care is available.

1.2.5 Apartheid, poverty and family breakdown

⁴ Government of the Republic of South Africa (1998) ‘CEDAW Report’, op cit, at 11-1.

⁵ Budlender, D (ed) (1997) The Second Women’s Budget. Cape Town: Idasa, 26.

⁶ Budlender, D (1997), *ibid*.

⁷ Liebenberg, S (1998) “The National Water Bill: Breathing Life into the Right to Water” in *ESR Review* Volume 1, Number 1, 3, at 3.

Due to the history of Apartheid land legislation and policies, African people have had extremely limited access to land. There has been an added disadvantage facing African women in accessing land due to discriminatory customary laws and practices. Poverty and educational disadvantage of parents means that rural children are at a developmental disadvantage.⁸

Burman⁹ has documented the breakdown of the African family in South Africa. Her figures indicate a 50% de facto divorce rate in African marriages in Cape Town, whether customary or civil law marriages. Most of these marriages produce children who end up staying with their mother or her family. Her research also points to the prevalence of illegitimacy in African families. There is a very high rate of maintenance default in South Africa indicating a culture of non-involvement by fathers in their children's lives. The history of Apartheid policies aimed at controlling the movement and residence of rural and urban Africans, has contributed significantly to this family breakdown. But even amongst other population groups, the divorce rate is very high¹⁰ with increasing numbers of children being cared for by single mothers.

State maintenance has recently been made available to poor parents with children under the age of seven in the amount of R100 per month per child but remains difficult to access for most people and is sorely inadequate to meet the high costs of living.

1.2.6 Women in formal employment

Women engaged in economic activity away from the home use a number of mechanisms for the care of their children. These include (the relatively few) state, private and charitable creches; home care by paid child minders; care by other household members; care by relatives and neighbours; dispersing of children to other families; leaving children in the care of older siblings; leaving children at home without care. The breakdown of kinship networks and extended families

⁸ RDP Office, Office of the President, South Africa, (1995) Children, poverty and disparity reduction : towards fulfilling the rights of South Africa's children. Pretoria: Office of the President, at 83.

⁹ Burman, S (1991) "Capitalising on African Strengths: Women, Welfare, and the Law" in *South African Journal of Human Rights* Volume 7, Part 2, 215.

¹⁰ Sinclair, J (1996) The Law of Marriage Volume 1, Kenwyn: Juta, at 205.

has seen many of these forms of assistance diminish in recent years.¹¹

For women in formal employment, the provision of child care needs to be seen in the context of labour legislation aimed at providing maternity and parental benefits. These are relatively limited. Under the Basic Conditions of Employment Act¹² women are not entitled to work for four weeks before and eight weeks after the expected date of birth.¹³ A woman who gives birth is entitled to claim 45% of her salary for six months on condition that she has contributed to the Unemployment Insurance Fund for a certain period of time.¹⁴ A new Basic Conditions of Employment Act¹⁵ provides for four months maternity leave. This Act has not however, been put into operation, nor has the extent of remuneration or unemployment insurance to be paid to workers taking this leave, been determined.¹⁶ Without pay, most women will struggle to afford this period off work. Male and female workers have been given three days paid family responsibility leave to attend to a sick child or to be present when a child is born under the new Act.¹⁷ There is also some protection provided to pregnant and nursing women workers regarding night work and potentially dangerous work but the Minister has still to issue a Code of Good Practice on the Protection of Employees during pregnancy and after the Birth of a Child.¹⁸ There is no requirement in either the new or old Act for the provision of child care facilities or nursing breaks. Thus, women in formal employment have to make arrangements for themselves regarding care of children from the age of three or four months.

¹¹ See Niehaus, IA (1988) "Domestic dynamics and wage labour : a case study among urban residents in Qwaqwa" in *African Studies*, Volume 47, Number 2, 12; and Cock, J, Emdon, E and Klugman, B (1984) "Child care and the working mother: A Sociological investigation of a sample of urban African women" Carnegie Conference Paper No. 115.

¹² 3 of 1983.

¹³ Ibid, s 17(b).

¹⁴ S 37 of the Unemployment Insurance Act 30 of 1966.

¹⁵ 75 of 1997.

¹⁶ Ibid, s 25.

¹⁷ Ibid, s 27.

¹⁸ Ibid, s 26.

Because of very limited subsidised child care provision, parents (generally women) have to bear the costs of child care. Mothers have physically to ensure that children get to out of home care. They have to worry about leaving work on time to fetch children and worry about their work performance when problems with child care arrangements encroach on their work time and performance.

1.2.7 The need for child care

The above discussion has shown that poverty and lack of state support make many of the universal difficulties with child care particularly onerous for South African women. These are not problems facing most fathers in this country because there are women taking responsibility for their children. At the same time, the nature of gender roles in our society means that men fail to benefit from more active involvement with their children. Improved child care provision should not only address women's disadvantaged position but should also attempt to redefine the way in which men and women in society approach the care of children. This would mean that not only would women receive practical assistance but that a broader transformation of gender relations may begin to occur.

Certain feminist theories have been developed in an attempt to explain the unequal gender relations which result in the imbalance of child care responsibilities. These theories, which will now be briefly outlined, inform the discussion in the rest of this study.

1.3 EXPLAINING UNEQUAL GENDER ROLES REGARDING CHILD CARE

1.3.1 The Sexual Division of Labour and the Dual Shift

Society and all its institutions, including the family, the workplace and the economy are structured along gendered lines. Feminist theorists have tried to describe and explain how patriarchy operates and why it is so deep rooted. The term 'division of labour', used to describe the fissures created by capitalism within the working class, has also been seen as having a

gendered form. Barrett¹⁹ says that this in turn takes a vertical and horizontal form. The vertical division of labour between men and women results in men being paid more and being afforded better working conditions than women. The horizontal division results in particular types of work being done by women and others by men. Women's work is generally in the service sector, 'caring' professions and other socialised forms of domestic labour which is devalued by the market. It often consists of part-time work which is less regulated and more insecure than full-time work. Barrett²⁰ notes that "it is clear, for instance, that women's involvement in the highly exploited areas of part-time work and home-work is the direct consequence of their responsibility for child care. This type of work is not only most convenient for a worker with responsibility for children, it is often (in the absence of nursery or after-school provision) literally the only work available."

The sexual division of labour not only describes the workplace, it also describes the position in the home and family. Hochschild,²¹ in her important study, notes that "just as there is a wage gap between men and women in the workplace, there is a 'leisure gap' between them at home. Most women work one shift at the office or factory and a 'second shift' at home". Cock et al²² show that in South Africa, full-time motherhood is not possible for most urban African women who have to support themselves and their dependents or supplement their husband's income. They argue that such women are required to obtain a cash income to satisfy the physical needs of their children and this "economic necessity generates a fusion of the mother/worker roles". The notion of a model worker as a man, located in a nuclear family, is clearly inappropriate to describe the situation in South Africa. Their study found that many women are suffering from exhaustion as they work between 16 and 18 hours per day. No one in their research sample received any assistance from their husbands in the preparation of food although some women were assisted by other women in the household. The authors note that the double shift inhibits women's participation in community organisations and trade union activities. (This consequence of

¹⁹ Barrett, M (1980) Women's Oppression Today: Problems in Marxist Feminist Analysis. London: Verso, 154-5.

²⁰ Ibid, at 157.

²¹ Hochschild, A (1989) The Second Shift. New York: Viking, at 4.

²² (1984), op cit, at 3-8.

women's position in society will be examined in greater detail in the chapter on the right to citizenship).

Many feminist theorists have argued that the sexual division of labour is an insufficient concept to explain why women continue to face oppression in the home and at the workplace. They point to the examples of Scandinavia and the former Soviet Union where the state provided child care to all parents. Even in these countries, job segregation remains a reality and men still leave most of the household reproductive labour to women. Apter²³ says "if child care facilities do not offer the final solution, if there is still simply too much women's work in the home, however well provided-for are the children during working hours, then perhaps the problem is that men do not help enough, that the working woman remains a wife, taking on a second shift at home after her working day ends." An explanation of this inequality is rooted in a combination of economic, ideological and psychological factors. Different feminist theories give greater or lesser weight to each of these but all acknowledge that the problem of patriarchy is deep rooted and no easy solution exists for addressing women's oppression.

1.3.2 The invisibility of domestic labour

Women's domestic labour is invisible, unvalued and uncounted at the level of macroeconomics. A feminist economist²⁴ comments that as a politician she "found it virtually impossible to prove - given the production framework with which we were faced - that child care facilities were needed. 'Non-producers' (housewives, mothers) who are 'inactive' and 'unoccupied' cannot, apparently, be in need. They are not even in the economic cycle in the first place. They can certainly have no expectation that they will be visible in the distribution of benefits that flow from production". This explains why unemployed women are seen as having no child care requirements. But, as has been explained above, looking after children prevents women from looking for work and hampers their ability to engage in basic subsistence activities.

²³ Apter, T (1993) Working Women Don't Have Wives: Professional Success in the 1990s. New York: St.Martin's Griffin, at 9.

²⁴ Waring, M (1988) If Women Counted: A New Feminist Economics. San Francisco: Harper, at 2.

1.3.3 The model of the male worker

Internationally, the decades since World War Two have seen increasing numbers of women enter the formal labour market. Feminist writers²⁵ have noted that despite this, women workers remain largely invisible within labour law and employment policies. These policies are constructed around a model of a worker who is "full-time, continuous, and usually skilled: he is historically the male breadwinner, the earner of the family wage."²⁶ Because of this assumption, policies that aim to meet the needs of working women such as for adequate maternity leave and child care are often the last to be introduced, if at all.

Labour law has dealt with some of women's needs but has not really succeeded in shifting the emphasis away from the needs of the male worker. It has struggled to develop policies that accommodate the "combination of paid work and child care responsibilities".²⁷

1.3.4 The Public/Private Dichotomy

Feminist theory has given significant consideration to its critique of liberal theory's public/private dichotomy. In fact, Pateman says that "it is, ultimately, what the feminist movement is about".²⁸ An understanding of this concept is helpful in analysing and dealing with the problems related to child care.

The concept of the public/private has been central to the ideology accompanying capitalist industrialization. It has justified the creation of separate spheres of work and family as the

²⁵ See Conaghan, J (1986) "The Invisibility of Women in Labour Law: Gender-neutrality in Model-Building" in *The International Journal of the Sociology of Law* Volume 14, 377; and Teghtsoonian, K (1997) "Who pays for caring for children? Public policy and the devaluation of women's work" in S Boyd (ed) Challenging the Public/Private Divide: Feminism, Law, and Public Policy, Toronto: University of Toronto Press, 113.

²⁶ Conaghan, J (1986), *ibid*, 382.

²⁷ Fredman, S (1994) "A Difference with Distinction: Pregnancy and Parenthood Reassessed" in *The Law Quarterly Review*, vol 110, 106, at 106.

²⁸ Pateman, C (1989) The Disorder of Women: Democracy, Feminism and Political Theory, Cambridge: Polity Press, at 118.

household as productive unit has been broken down.²⁹ Liberalism sees the sphere of work and state as the public realm while the family and home is a private sphere of non-intervention where people are free from outside interferences. Feminist theorists have pointed out that this divide between the family and the market/state is a gendered divide, ultimately relegating women to a separate sphere and justifying non-intervention into abuses of women in the home.³⁰

Boyd,³¹ drawing on Olsen, lists the various ideological structures that make up the public/private divide as a mechanism for women's oppression. Firstly, a distinction is made between the state (public) and the market (private). This is used to justify the lack of state intervention in the 'free' market. Thus, governments often resist pressure to require employers to provide assistance to women workers, such as the provision of child care. Secondly, the public/private divide also entails a distinction between the market/public and the family/private. This explains why women's work in the home is unpaid and invisible. It also contributes towards the undervaluation of women's work in the workplace since it resembles women's unpaid work in the home. Thirdly, there is a distinction between the state/public and family/private. The family is viewed as a sanctuary where the state is unable to regulate people's lives. This has been used to justify and excuse men's domination of women (and children) within the family, including through the use of violence. This relates to the unequal domestic burden that women carry in the home. A final division, of less relevance to this study, is the public/private distinction of international law between states/public and domestic state activities/private.

This explanation of the material and ideological basis of the public/private dichotomy assists in an understanding of why child care remains the primary responsibility of women in society.³²

²⁹ Boyd, S (1997) "Challenging the Public/Private Divide: An Overview", in S Boyd (ed), *op cit*, at 8.

³⁰ See O'Donovan, K (1985) *Sexual Divisions in Law*, London: Weidenfeld and Nicholson; and Olsen, F (1983) "The Family and the Market: A Study of Ideology and Law Reform" in *Harvard Law Review* Volume 96, Number 7, 1497.

³¹ (1997), *op cit*, 8-11.

³² See further Teghtsoonian, K (1995) "Work and/or Motherhood: The Ideological Construction of Women's Options in Canadian Child Care Policy Debates" in *Canadian Journal of Women and the Law* Volume 8, Number 2, 411; and Teghtsoonian, K (1997), *op cit*.

1.3.5 Strategic and Practical Gender Needs

The above discussion has outlined some of the theories developed by feminists to attempt to analyse the unequal and different gender roles in society and how this impacts on child care. Some feminist theory has tried to move beyond analysis to develop approaches that will address these gender divisions. The work of Caroline Moser³³ is particularly useful for the purposes of this study. Moser, writing in the development context, draws on the work of Maxine Molyneux, in her use of the concept of strategic and practical gender needs. She explains that strategic gender needs are "needs that women identify because of their subordinate position to men in society".³⁴ Thus, meeting these needs would involve restructuring relations between men and women in society through reorganising society more equally. Moser gives Molyneux's examples of some of these as including the abolition of the sexual division of labour, the alleviation of the burden of domestic labour and child care and the establishment of political equality. In contrast, practical gender needs are needs that do not challenge women's structural position of inequality but arise out of it and are a response to actual difficulties such as lack of water, health care and employment.

Moser³⁵ shows how the location of child care facilities can meet different gender needs. If the facilities are located at the woman's workplace, they will meet her practical gender needs by allowing her to engage in wage labour but will not challenge the division of labour in the home. If they are located in the community, this may encourage greater sharing of family responsibilities between men and women but women, whether the mother or another female family member, are likely to ensure that the child gets to the facility. If they are located at the father's workplace, this removes some of the burden of domestic labour from the woman and involves the father in some child care responsibility. This creates the possibility of meeting both practical and strategic gender needs.

³³ Moser, C (1993) Gender planning and development: Theory practice and training. London: Routledge.

³⁴ Ibid, at 39.

³⁵ Ibid, at 53.

These concepts have great importance in the planning of the provision of child care in South Africa. They also have importance for any legal strategies developed to address the problems of inadequate child care in South Africa. Such strategies must attempt to ensure that women's basic needs are met but must also try to address the broader patterns of inequality in our society. This issue will be considered at various points in the study but will also be specifically considered in the conclusion.

1.4 THE RIGHT TO CHILD CARE

South Africa's adoption of a new Constitution³⁶ and Bill of Rights has mandated the development of a new legal culture. Demands for social and political change can now be voiced in terms of constitutional rights which go beyond rhetoric and have a justiciable form.³⁷ This study argues that provision of adequate, universal child care is a fundamental human right. Since child care is not referred to explicitly in the Bill of Rights, it is argued that the right is contained within the meaning of a number of express rights within the Bill of Rights. The Preamble to the Constitution states that the Constitution aims to, *inter alia*, "improve the quality of life of all citizens and free the potential of each person" and the interpretation clause³⁸ requires the Bill of Rights to be interpreted by promoting "the values that underlie an open and democratic society based on human dignity, equality and freedom". Based on these prescriptions, it is argued that the provision of child care as a right is necessary to improve the quality of life and free the potential of all South Africans, particularly women, and is a requirement for a society based on the values of equality, dignity and freedom.

To date, the courts have not directly considered the issue of child care as a right in any case. Practically, such a case could reach the courts in a number of ways. A piece of legislation or government policy dealing with existing child care facilities could be challenged, a taxpayer

³⁶ Unless stated otherwise, where reference is made to the Constitution in this study it is to the Constitution of the Republic of South Africa Act 108 of 1996.

³⁷ See Mureinik, E (1994) "A Bridge to Where?: Introducing the Interim Bill of Rights" in *SAJHR*, Volume 10, Part 1, 31; and Klare, K.E (1998) "Legal Culture and Transformative Constitutionalism" in *SAJHR*, Volume 14, Part 1, 146.

³⁸ S 39 of Act 108 of 1996.

might choose to argue that child care is a deductible business expense (as in the Canadian case of *Symes*³⁹), or an employee might challenge the lack of child care assistance from the employer. In such cases, the applicant would be able to frame the argument for the right to child care within a number of possible constitutional rights:

Firstly, the children's rights clause⁴⁰ might be used to argue that children are promised "social services" and therefor must be provided with child care. The right also states that children cannot be required to perform work that places the child's development at risk. This aspect of the right could be interpreted to mean that older children who currently have to care for younger children while their parents work should not be losing out on education or other aspects of their development, and therefor, that child care must be provided. Secondly, the right to education⁴¹ could be used to argue that the right to a "basic education" includes early childhood development prior to the school age (currently seven). Thirdly, the right to health care, food, water and social security⁴² might be interpreted to include child care where reference is made in the right to "social security, including, if they are unable to support themselves and their dependants, appropriate social assistance". Arguably, families whose members need to work or search for work and who cannot look after their children at the same time, require such assistance in the form of child care. The family's survival may depend on the income of the person who is currently looking after the children but who cannot acquire such income without child care assistance. Fourthly, the labour relations clause⁴³ could be understood to entail provision of child care benefits by employers as contained within the meaning of "fair labour practices".

The second and third of the above rights are part of the set of "socio-economic" rights contained in our Bill of Rights. They are seen as rights which will enable our courts to require substantive

³⁹ *Symes v. The Queen: Attorney General of Quebec, Charter Committee on Poverty Issues and Canadian Bar Association (Interveners)* [1993] 19 C.R.R. (2d), discussed further in Chapter 2 and 3.

⁴⁰ S 28 of the Constitution.

⁴¹ S 29 of the Constitution.

⁴² S 27 of the Constitution.

⁴³ S 23 of the Constitution.

delivery of services to South Africans. The equality and citizenship rights are often regarded as first generation or civil and political rights, with less ability to result in material changes for people. This study argues that all rights need to be understood substantively if we are to achieve the Constitutional aim of transforming our society. This means that rights must be expanded and their traditional meanings developed so as to effect deep rooted and material changes to the law and society. This study argues that the substantive right to child care is entailed within the rights to equality and citizenship based on the correct interpretation of the Constitution and its values.

This study recognises the strategic value of rights claims and shares this view with those theorists who argue for the value of rights in bringing about fundamental social change. The critique of rights advanced by certain critical legal scholars is that rights discourse is premised on individualism (a feature of liberalism, the ideology of capitalism). Rights become reified and offer one fixed meaning which people inevitably accept. Moreover, the language of rights encourages social movements to look to the state rather than themselves for social change. This has constrained political movements and reinforced the power and privilege of dominant groups in society.⁴⁴ Some feminists and critical race legal theorists⁴⁵ have responded to this critique of rights by arguing that the language of rights has resonance for many oppressed groups and that rights can be used politically to mobilise people and to press for social change within the context of a broader strategy for social transformation.⁴⁶ Other feminist writers are more cautious about the value of rights.⁴⁷

This study takes the view that if approached consciously and dialectically, rights can serve as one in a set of measures to address gender inequalities. The South African conditions are favourable

⁴⁴ See Rhode, D (1990) "Feminist Critical Theories" in *Stanford Law Review*, Volume 42, 617; and Schneider, E (1986) "The Dialectic of Rights and Politics: Perspectives from the Women's Movement" in *New York University Law Review*, Volume 61, 589.

⁴⁵ Such as Williams, P (1987) "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" in *Harvard Civil Rights-Civil Liberties Law Review*, Volume 22, 401.

⁴⁶ See Williams, P (1987), *ibid*; and Schneider, E (1986), *op cit*.

⁴⁷ See Fudge, J (1989) "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" in *International Journal of the Sociology of Law*, Volume 17, 445; and Olsen, F (1984) "Statutory Rape: A Feminist Critique of Rights Analysis" in *Texas Law Review*, Volume 63, 387.

to such an approach for two main reasons. Firstly, many of the struggles against Apartheid were framed in terms of human rights and therefor, the rhetoric of rights has meaning for millions of South Africans. This rhetoric has also been adopted by women's organisations and other groups struggling for gender equality. Secondly, our Constitution is extremely expansive and progressive, generally, and in particular on the subject of gender equality, and offers the possibility of developing a transformative constitutional law jurisprudence.

Deborah Rhode,⁴⁸ in arguing for the use of rights, challenges feminists to "not delegitimize ... (rights-based) frameworks but rather to recast their content and recognize their constraints. Since rights-oriented campaigns can both enlarge and restrict political struggle, evaluation of their strategic possibilities requires historically situated contextual analysis". A group of feminist legal theorists known as 'relational feminists' has taken up this challenge. This group attempts to reconceptualise rights by focusing on the transformation of social relationships. This innovative approach inspires and informs many of the arguments advanced in this study. The following are some of the key ideas of 'relational feminism':

The relational approach locates individuals within a network of interdependent relationships.⁴⁹ It does not regard rights as "belonging to individuals and arising from the imperative of self-preservation, but rather would view rights as claims grounded in and arising from human relationships of varying degrees of intimacy".⁵⁰ Nedelsky⁵¹ confirms that "a conception of rights that routinely directs our attention to structures of relationships is better suited to facilitate that transformation (of oppressive relations between men and women) than one, like the traditional liberal conception, aimed at the protection of boundaries". Rights have a contested meaning

⁴⁸ (1990), op cit, at 635.

⁴⁹ See Minow, M (1990) Making all the Difference: Inclusion, Exclusion, and American Law, Ithaca: Cornell University Press.

⁵⁰ Minow, M, Shanley M (1996) "Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law" in *Hypatia* Volume 11, Number 1, 4, at 23.

⁵¹ Nedelsky, J (1997) "Violence Against Women: Challenges to the Liberal State and Relational Feminism" unpublished paper presented on 22 January 1997, University of South Africa, at 455.

which shifts over time.⁵² There needs to be an active engagement with rights to ensure that the Constitution is used towards a transformative end. By examining rights historically and contextually, they can be redefined and can offer an interpretation that has the potential to challenge rather than entrench existing gender relations.

This positive framework is well suited for the purposes of this study. The study has argued that the different and unequal gender roles regarding child care emerge from the particular structure of human relationships in society. The right to child care is a means of challenging these relationships so as to both improve the position of women and transform the way men and women approach child care. This study 'reconceptualises' the rights to equality and citizenship so as to provide for the right to child care (in Chapters 3 and 4 below).

1.5 METHODOLOGY

This study uses secondary sources including child care literature, theoretical and legal materials to develop its argument. Feminist methodology requires that women's experience be placed at the centre of any analytical process. The study tries to glean this experience from existing studies in the fields of sociology, economics, education and others. While a more extensive legal study could undertake primary socio-legal research (for example, to ascertain how people understand their constitutional rights) such research is beyond the scope of this particular study. The arguments advanced in this study can however, be supported methodologically without such primary research.

1.6 TERMINOLOGY

The study uses the term "child care" to mean all arrangements provided as a service for the care of children. This could include home based or out of home care and may even include support for parents who look after their own children at home. It also includes the notion of care for custodial purposes and other purposes such as education, nutrition etc. It may involve full day

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Nedelsky, J (1993) "Reconceiving Rights as Relationships" in *Review of Constitutional Studies*, volume 1, 1.

care or part day care and applies to children of all ages who are not yet able to care for themselves. It is defined widely so as to include all measures that assist primary care takers, usually women, with the care of children.

The educational sector in this country uses the term 'Early Childhood Development' (ECD) to describe all measures that support the development of children from birth to age nine. The term 'educare' is also used in South Africa to connote the need for the combination of education and care for children between birth and age six. Some of the studies use the term 'day care' which has a more custodial connotation. These terms are used at certain points in the study but should generally be seen as interchangeable with the term 'child care' rather than implying any very different meaning.

1.7 CHAPTER BREAKDOWN

Chapter Two sets out the position regarding child care provision in South Africa. It also briefly surveys some of the international material regarding child care provision elsewhere in the world. It attempts to provide an analysis of current government policy on child care so as to set the scene for rights based arguments for child care in the subsequent chapters.

Chapter Three examines the South African case law and the emerging equality jurisprudence of the Constitutional Court. It also gives particular attention to a Canadian Supreme Court case which considered the issue of child care as a deductible business expense. An argument for viewing child care as an equality right is advanced.

Chapter Four considers the meaning of the right to citizenship in our Bill of Rights. It draws on feminist and political science theories regarding women's citizenship and tries to apply these to constitutional law. An argument for viewing the right to citizenship as entailing the provision of child care is advanced.

Chapter Five, the conclusion, summarises the main arguments of the study and discusses how these might be taken forward in litigation and via other legal mechanisms.

CHAPTER TWO: THE LEGAL AND POLICY FRAMEWORK FOR CHILD CARE - THE SOUTH AFRICAN AND INTERNATIONAL CONTEXT

In this chapter, the legal and policy framework for child care provision in South Africa will be examined before looking at the position elsewhere in the world. The examination of South Africa will begin with a brief discussion of the various rationales for child care; an outline of the history of child care provision in this country; the current extent of child care provision; and a description and assessment of legislation and government policy on child care. Then it will look at some of the options to address the lack of child care proposed by a number of important studies. These give an insight into the specific conditions and constraints informing South Africa's child care debate. The position regarding state provision of child care in other countries will then be examined with a particular emphasis on the legal and constitutional measures employed in some of these countries. Finally, certain suggestions for legal and policy reform are made. This chapter provides an overview of the practical challenges and policy debates regarding child care. This locates the discussion of the constitutional right to child care (in the following chapters) within the difficult reality of providing child care to all South Africans who need it.

2.1 CHILD CARE IN SOUTH AFRICA

2.1.1 Rationales for Child Care

The literature on child care advances a number of different arguments for the importance of adequate and increased provision of child care to the society. Atmore's¹ categories are useful here. They include:

2.1.1.1 *The Human Rights argument*: This argument is generally based on children's right to development which involves 'redressing inequalities brought about by poverty and

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Atmore, E (1996) Affordable early childhood development provision for preschool children in South Africa Pretoria: HSRC, 5-6.

discrimination'.² The gender rights argument, the central argument of this study, is rarely articulated in the South African literature. It must be seen as an important part of the human rights argument.

2.1.1.2 *The moral argument*: This argument suggests that early childhood development programmes enable the society to pass on positive moral and social values to children. This is motivated with reference to the erosion of values in South Africa³ but is also seen as a positive means of encouraging non-racism and non-sexism.⁴

2.1.1.3 *The social equity argument*: This is also an argument with two dimensions. Firstly, race and class disadvantage cause many children to lag behind their less disadvantaged peers. Improved child care provision can help to uplift these children and give them a "fair start" in life.⁵ Secondly, gender disparities based on previous disadvantage can be addressed through such programmes.⁶

2.1.1.4 *The economic argument*: This has many dimensions. One of the key arguments is that because of the low drop-out rate in early primary school, ECD programmes can save costs by preventing rather than curing problems at school. This impacts not only on the costs of education but other social costs. Children who have access to ECD are more likely to find employment and are less likely to have antisocial behavioural problems such as drug and alcohol dependencies.⁷ Improved educational and nutritional levels have

² Naidoo, R, Nyman, R and Caga, X (1996) Starting early : a child care provision framework for workers. Johannesburg : Naledi, 5.

³ Padayachie, R, Atmore E, Biersteker, L, King, R, Matube, J, Muthayan, S, Naidoo, K, Plaatjes, D, Evans, J (1994) Report of the South African Study on Early Childhood Development: Recommendations for Action in Support of Young Children. Washington, DC: The World Bank, 1-2.

⁴ Naidoo (1996), op cit, 5.

⁵ Atmore (1996) op cit, 5; Padayachie (1994) op cit, 1; Naidoo (1996) op cit, 5.

⁶ Balie, P (1993) Early Childhood Educare: Corporate/Private Sector Funding in South Africa (an empirical research report). Unpublished report of the National Educare Forum, 10.

⁷ Atmore (1996) op cit, 5.

macro-economic advantages for the country as they mean more 'skilled workers and higher productivity'.⁸ In addition, a trade union commissioned study⁹ argues that employers and workers benefit from improved child care provision. There is lower worker turnover, a greater ability to attract skilled staff, less maternity leave time is taken, workers display greater loyalty and commitment to the employer, workers are more productive and the employers image is improved.

2.1.1.5 *The programmatic argument*: This argument suggests that ECD programmes assist the state in delivering health, nutrition and education services. These programmes can also assist with broader community development and job-creation initiatives.¹⁰

2.1.1.6 *The psychological development argument*: Atmore,¹¹ in advancing this argument, says that early development is 'vital for the formation of personality structure, intelligence and social behaviour'. If children are reached early and prepared physically and mentally for society, the cycle of poverty can be broken.

Based on the above rationales (including the gender rights argument which will be developed in this study) the motivation for improved child care provision in South Africa is both well developed and extensive. I now examine the history and nature of child care provision in this country as a means of explaining why this provision is both limited and racially skewed today.

2.1.2 History of Child Care Provision

The history of child care provision in South Africa is intimately tied to the history of Apartheid discrimination in delivery of services. It is this history that shapes the current racial imbalances

⁸ Naidoo (1996) op cit, 5.

⁹ Naidoo (1996) op cit, 5-6.

¹⁰ Balie (1993) op cit, 10; Padayachie (1994) op cit, 1-2; Atmore (1996) op cit, 5-6; Naidoo (1996) op cit, 5.

¹¹ Op cit, 6.

in access to child care facilities and resources.¹²

During the first three decades of this century, local communities, parents, welfare organisations and certain municipalities began investigating the causes of high infant mortality rates. Support was given by these organisations to families and communities both within and outside of the home, with nursery schools being started in the 1930s.¹³ In 1940, the Department of Social Welfare began to subsidise day care centres while provincial education departments subsidised nursery schools. This differentiated provision indicates an early difference between the department of welfare, which saw creches as custodial, and the department of education which saw nursery schools as educational. Welfare subsidies were available for all race groups but education subsidies were not available for Africans.

Padayachie et al¹⁴ note that subsidies only partially covered the costs of child care with parents having to pay the balance. As costs rose, subsidies covered less and because white parents were better off, the quality of services for white children soon outstripped the quality for other race groups.

Also in 1940 the government set up training courses for nursery school teachers which were, however, based on racial lines. From 1948 to 1969, government support for ECD decreased and was mainly provided to 'poor white' children. In 1958 the government closed down the training courses for African teachers. These steps were a result of the government's policy of Bantu Education which divided education along racial lines and aimed to educate blacks for their position of 'inferiority' in society.

The National Education Policy Act 39 of 1967 resulted in provincial education departments taking over nursery school provision and training which saw some improvement in services for white children during the 1970s.

¹² Most of the information in this section is drawn from Padayachie (1994), op cit, 8-10.

¹³ Balie (1993), op cit, 12; Padayachie (1994), op cit, 8.

¹⁴ Op cit, 8-10.

The report of the Wiehahn Commission of Enquiry which convened in 1979 to evaluate the state of labour law in South Africa, was one of the few official documents to recognise that women workers needed day care facilities. It recommended that day care centres be provided and subsidised.¹⁵

The De Lange Commission of 1981, set up by the HSRC to investigate educational reform, noted the poor performance of African children under the Department of Education and Training (DET). It recommended a one-year bridging programme which was accepted in a government white paper on the Provision of Education in South Africa in 1983. Despite this interest in improved ECD, the government decided to withdraw all funding from pre-primary education. The DET was forced to abandon this aspect of its education provision.¹⁶ During 1983, the Department of Co-operation and Development withdrew the small welfare subsidy it had been giving to creches for black children.¹⁷

During the mid-1980s the extra-parliamentary mass based education movement began to coordinate its activities and place increased pressure on the government to improve the situation. The National Education Coordinating Committee (NECC) initiated a study under the auspices of the National Education Policy Investigation (NEPI) in 1990. This study, published in 1992, produced the first clear recommendations for the restructuring and provision of ECD in South Africa. It was largely the work of educational non-governmental organisations (NGOs) that created the basis for the new, democratically elected government to move away from the failures of past policy and child care provision.¹⁸ (I will examine the period since 1994 in the section on government policy on child care, below).

¹⁵ Cited in Cock, J, Emdon, E and Klugman, B (1984) "Child care and the working mother: A Sociological investigation of a sample of urban African women" Carnegie Conference Paper No. 115, 22-23.

¹⁶ Padayachie (1994), op cit, 9.

¹⁷ Cock (1984), op cit, 22.

¹⁸ Padayachie (1994), op cit, 10.

The Department of Education¹⁹ notes that the current, inherited situation is 'inadequate, fragmented, uncoordinated, unequal and generally lacking in educational value. It is further characterised by a long history of discriminatory provision with regard to race, geographic location, gender, special needs and funding'.

This brief history shows that child care has never been extensively provided in South Africa. The little state provision there has been, was always more accessible to whites than to blacks. Despite recommendations for improved child care, various Apartheid government failed to address the position. The work of NGOs in the recent period created the impetus for attempts by the new democratically-elected government to address this position.

A brief description of the existing extent of child care provision is now provided. This indicates the small amount of formal child care available in South Africa and the racial differentials in accessing it.

2.1.3 Extent of Provision of Child Care

As a result of the history of racially allocated child care provision, current provision is racially skewed. There is no up-to-date data on the exact number of children in child care facilities provided by the state or private bodies. This reflects the poor statistical base available on service delivery generally in South Africa but also highlights the poor levels of coordination and organisation within the child care sector.

The study most often relied on for statistics in the child care literature is a World Bank study with data from 1991 to 1993.²⁰ This study found that there were approximately 5,8 million children under the age of seven in South Africa. African children made up the majority of this figure (83%). While one third of white children had access to some form of child care, only a small proportion of black children had any access at all (6% of African children, 11% of Coloured

¹⁹ Department of Education (1996) Interim Policy Document for Early Childhood Development as National Education Policy. 2-3.

²⁰ Padayachie (1994), op cit, 5-6.

children and 13% of Indian children).²¹ The total number of children with access to child care across race lines is less than one-tenth of all South African children (9%).

In addition to the race disparities, there is also significant inequality between rural and urban areas. In the rural areas of the former Transkei, Kwa-Zulu/Natal and the Northern Province, a tiny number of black children (less than 4%) had access to educare in 1992, with even less children living on farms (2%) having any access.²²

Kruger and Motala²³ note that there is unpublished research (based on the 1995 October Household Survey) which indicates that child care provision may be somewhat higher than previously estimated. This data suggests that 21% of under six year olds have some access to a pre-school, creche or day care centre. Whatever the true figure, however, provision is clearly limited to a minority of children and reaches the most advantaged rather than the most needy.

The existing provision of child care is often of poor quality within poor facilities where the conditions for learning are inadequate. Many of the personnel involved in child care are poorly trained or untrained. Here too, there are racial differences. Most state-supported, white, pre-primary facilities are staffed by personnel with some tertiary education while most personnel in African educare centres were untrained (71%) or had limited, largely non-formal training (29%).²⁴

The limited access to child care includes the following possible facilities: (a) centre-based eg: nursery schools, creches, pre-primary classes, and schools; (b) home-based care run by child minders or day mothers; (c) programmes which include home-based care and some agency linked

²¹ Schindler J, Chabane, S and Arnott, A "Education" in Budlender, D (ed) (1996) The Women's Budget. Cape Town: Idasa, 151-4, referring to Padayachie (1994), *ibid*.

²² Schindler (1996), *ibid*.

²³ Kruger, J and Motala, S (1997) "Welfare" in Robinson, S and Biersteker, L (1997) First Call: The South African Children's Budget. Cape Town: IDASA, 100.

²⁴ Schindler et al (1996), *op cit*, 152.

stimulation and feeding scheme.²⁵ There are only a tiny number of employers with on-site child care facilities in South Africa.

2.1.4 Legislation and Government Policy on Child Care

The new ANC government was under immediate pressure to address the legacy of poor child care provision when it came into office in 1994 given its commitment to overcoming poverty and disadvantage. The government had to ensure that the demands of the new Constitution were being met. It also had to abide by a number of international conventions which it had signed and ratified, which deal with the issue of child care. As a result, the government has passed certain legislation which has bearing on the issue of child care. It has also made a number of important policy statements concerning improvements to the position of child care in South Africa.

The following are the international conventions, legislation and policy papers produced by the government since 1994 which require the increased provision of child care. Since child care is a cross-cutting area of service delivery, a number of different government departments are involved in various aspects of child care.

2.1.4.1 *The Constitution*

The Constitution provides a new framework within which to view laws in South Africa. It requires the government to ensure that both old and new laws do not fall foul of the Bill of Rights. Further, it will be argued below, the Constitution should be interpreted to require the improved provision of child care.

2.1.4.2 *International Conventions*

South Africa has ratified the United Nations Convention on the Rights of the Child (1989) ('CRC') and the Convention on the Elimination of All Forms of Discrimination Against Women (1979) ('CEDAW'). The CRC requires state parties to ensure that children are given the

²⁵

Ibid.

necessary protection and care²⁶; that children of working parents are able to benefit from child-care services and facilities²⁷; and that the child's right to education²⁸ is enforced. The CRC provides a minimum set of rights and obligations on the state. While it places primary responsibility for the child's care and development on the parents of the child, it recognises that states need to assist parents and provide services and facilities for child care.

CEDAW does not go as far as the CRC in requiring state provision of child care. Nevertheless, it does require state parties to 'encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities'.²⁹

There are a number of International Labour Organisation (ILO) conventions and recommendations dealing with the rights of women workers and workers who are parents. South Africa has only signed a handful of ILO Conventions including Convention Number 111 (1951) dealing with the elimination of discrimination. It is considering adopting Convention Number 100 (1952) dealing with equal remuneration. But it has not adopted Convention Number 103 (1952) dealing with maternity protection, Convention Number 156 (1981) or Recommendation Number 165 (1981) dealing with workers with family responsibilities.³⁰

2.1.4.3 *Legislation*

The Department of Welfare

²⁶ Article 3.

²⁷ Article 18.

²⁸ Article 28.

²⁹ Article 11(2)(c).

³⁰ Brocas, A-M (1997) "Equality of Treatment between Men and Women in Social Security and Family Responsibilities" in E Date-Bah (ed) *Promoting Gender Equality at Work*. London: Zed Books, 155-165. Information also obtained telephonically from the office of the ILO in Pretoria on 29 May 1998.

The Child Care Act 74 of 1983, despite its name, does not deal directly with the provision or regulation of child care facilities other than those where children are removed from parents or require institutional protection. Recent amendments³¹ to the Act have introduced certain positive features which reflect a move towards greater protection of the rights of children.³² The Act is currently being reviewed by the South African Law Commission. The Commission has taken submissions from various bodies including ECD organisations³³ and has released its first issue paper.³⁴ The paper sets out a framework for the development of a comprehensive piece of legislation dealing with children in South Africa. It recognises the gendered division of labour in society and the unequal child care burden on women and 'the consequent need to further substantive (rather than merely formal) equality'.³⁵ The paper does not define the extent to which the regulation and provision of child care will form part of new proposed legislation. It remains to be seen whether the proposals will go beyond procedural remedies and venture into the more substantive terrain of state provision of services and deal with the economic constraints on the state's ability to implement such proposals.

The Social Assistance Act 59 of 1992 provides for broad state assistance in the form of pensions and grants. It makes no mention of child care subsidies but simply delegates wide powers to the provinces to allocate their provincial budgets. Almost the entire welfare budget is allocated through the provinces with most of the money going to grants and pensions and a much smaller amount going to welfare services.³⁶ To date, welfare subsidies have only been provided for children in registered full-day facilities based on parental means. Historically, these facilities

³¹ Child Care Amendment Act 96 of 1996; Welfare Law Amendment Act 106 of 1997.

³² See Sloth Nielsen, J and Van Heerden, B (1998) 'Putting Humpty Dumpty Back Together Again: Towards Restructuring Families' and Children's Lives in South Africa' in *South African Law Journal*, Volume 115, Part 1, 157, at 158-160.

³³ These have included submissions from the Wits Education Policy Unit, the Early Learning Resources Unit and the Department of Education. The writer of this study also made a submission regarding gender issues and child care on behalf of the Centre for Applied Legal Studies.

³⁴ The South African Law Commission (18 April 1998) The Review of the Child Care Act. Project 110, Issue Paper 13, First Issue Paper.

³⁵ Ibid, at 8.

³⁶ Lund, F, Ardington, S and Harber, M "Welfare" in Budlender, D (ed) (1996) The Women's Budget. Cape Town: Idasa, 97, at 99.

were treated differently based on race and geographic location, with the most disadvantaged children generally the worst off in terms of resourcing of facilities.³⁷ Former homeland and racially based departments have been rationalised into a single department per province and it is up to each province to determine the subsidy formulae to be used. Newman states that the total expenditure by the Department of Welfare on ECD (in all provinces except the North-West*) amounted to R54 573 000. This seems to have all been used as per capita subsidies for children in centre-based daycare³⁸ and amounts to 18% of provincial social assistance budgets, with 9% of the total welfare budget being spent on children generally.³⁹ This is obviously a small amount of the already overstretched Welfare budget and cannot begin to address the enormous need for child care facilities and services.

Department of Education

The South African Schools Act 84 of 1996 is the legislative centre-piece of the Education Department's efforts to transform education. Its Preamble stresses the need to remedy past inequality in education. Its ambit of operation however, is only learners starting from the first year of primary school.

The Education Affairs Act 70 of 1988 deals with pre-primary schools wherein learners of three years and older are enrolled. The Act provides for the registration and subsidisation of private pre-primary schools where the school has twenty or more learners under the age of seven.

The National Education Policy Act 27 of 1996 creates a framework for the development of national education policy based on the need to transform the education system and uphold the fundamental rights of all South Africans. Its ambit covers ECD and pre-primary schooling. It requires annual monitoring and evaluation of all aspects of education provision.

³⁷ Newman, M (1998) "Early Childhood Development in South Africa: Key Issues" unpublished submission to the South African Law Commission: Project 110 (Review of the Child Care Act) by the Early Learning Resource Unit, Cape Town, 6 March 1998, 15.

³⁸ Ibid.

³⁹ Newman (1998), op cit, 23.

2.1.4.4 Government Policy Documents

Department of Welfare

The White Paper for Social Welfare⁴⁰ identifies children from birth to six as particularly vulnerable and notes the lack of services and the poor quality of existing programmes for such children. It commits the government to strengthening families in need and requires social services for those families 'involved in child-rearing and caring for their members at unacceptable social cost to themselves'. It states that a national ECD strategy must be devised together with other government departments, civil society and the private sector, financed publicly and privately, and implemented nationally and provincially. The Department commits itself to targeting disadvantaged children under the age of five. It recognises that 'no single model or programme is appropriate to meet the varied ECD needs of families and a range of options will have to be made available such as home and centre-based services; after care for school-going children; stimulation programmes including part-day programmes; and family, education, health and nutrition programmes'. The White Paper stresses the need to rely on existing NGOs and government bodies already offering services and to create new initiatives where these do not exist. It talks of providing training to ECD service providers and registering programmes.

The Department of Welfare is currently leading a 'flagship programme for unemployed women with children under five years'. This project attempts to empower women economically while providing education and care for young children. This project indicates some willingness to implement the Welfare White Paper intersectorally. Kruger and Motale⁴¹ note however, that the welfare system remains inappropriately oriented towards the elderly and the disabled and does not cater adequately to the needs of poor families and children.

Department of Education

⁴⁰ Ministry for Welfare and Population Development (1997) White Paper for Social Welfare. August 8, GG Number 18166, 3.

⁴¹ Op cit, 103.

The White Paper on Education and Training⁴² sees ECD as covering children from birth to nine years of age. It commits the Department of Education to leading an inter-departmental programme together with the Departments of Health and Welfare. It identifies the need for the establishment of a statutory consultative body on ECD. It says that the new Directorate of ECD and Lower Primary Education is responsible for developing an ECD curriculum and notes the role of NGOs in this area. It introduces the reception year which will be phased in over a period of years and gives priority to children in under-resourced areas.

The Directorate for ECD and Lower Primary Education was established in 1995 but in April 1997 it was subsumed into the Schools and ECD Directorate. Newman notes that this is seen by many as a 'downgrading of the importance of the early years'.⁴³

In 1996 the Department of Education produced its Interim Policy for ECD⁴⁴ which expands on the commitments of the White Paper. It initiates a three year ECD pilot project and a strategy for the implementation of the reception year. It also includes a curriculum framework and accreditation guidelines for ECD provision. The document indicates that the policy framework will subsist for the three years of the pilot and will result in the development of a new policy for ECD thereafter. The document says that the Department must concentrate on both birth to five year olds as well as the five to six year old to be included in a reception year. This reception year will be phased in over five years (although Newman says that this is 'widely thought to be unlikely due to budget constraints'⁴⁵).

The Interim Policy document envisages the creation of a Statutory Advisory Council to advise the Minister on ECD. The Department has set up an interdepartmental Ad Hoc Coordinating Committee on ECD but practitioners suggest that the statutory body is unlikely to ever be set up.

⁴² Department of Education and Training (1995) White Paper on Education and Training, March 15, GG Number 16312, 1

⁴³ Op cit (1988), 16.

⁴⁴ Department of Education (1996) Interim Policy Document for Early Childhood Development as National Education Policy, in terms of the National Education Policy Act No. 27 of 1996.

⁴⁵ Op cit (1988), 17.

What appears to be more likely is the establishment of a statutory body for Education as a whole, on which ECD has a seat. This is seen as linked to the disbanding of the separate ECD directorate and the subsuming of ECD into the Schools and ECD Directorate.⁴⁶

R6,907 million (0,12% of the education budget) is allocated from the national budget for ECD.⁴⁷ R50 million in seed money has been approved by the Department for the reception year pilot which will reach 67 555 children⁴⁸. Community-based ECD services will be given subsidies of R2,00 per day per child for running costs. In addition, existing subsidies for pre-primary schooling have been retained in many provinces. In 1996/7 pre-primary education received 0,44% of the overall education budget. Motala sees this budget allocation as a 'disturbing trend' that despite government policy statements, there is a neglect of ECD provision.⁴⁹ She notes that because ECD funding occurs mainly at provincial level, it is vulnerable to other provincial priorities. She recommends that alternative approaches to funding be considered. She also recommends the creation of tax concessions for ECD and that local government, the private sector and the community participate in raising funds and contributing to increased provision.⁵⁰

Other Government Departments

While Welfare and Education are the government departments most concerned with child care, a number of other government departments and projects deal with or have dealt with the issue of child care:

The National Programme of Action for Children falls under the President's Office and coordinates an overall plan for assisting children; the Reconstruction and Development Programme (RDP), now no longer in existence, identified the importance of child care and

⁴⁶ E-mail correspondence with Linda Biersteker of the Early Learning Resource Unit, 28 April 1998.

⁴⁷ Motala, S (1997) "Education" in Robinson, S and Biersteker, L (eds) (1997) First Call: The South African Children's Budget. Cape Town: IDASA, 135.

⁴⁸ Wolpe et al (1997), op cit, 68.

⁴⁹ Op cit (1997), 135.

⁵⁰ Op cit (1997), 139-141.

education;⁵¹ the Department of Health has increased its spending on primary health care with a significant emphasis being placed on the needs of children in both its policy and implementation; and the National Nutrition and Social Development Programme (NNSDP) (which falls under the Department of Health) has improved the quality of feeding in early childhood centres.

2.1.4.5 *Assessment of state provision of child care*

From 1994 to the present time, numerous government policy documents have raised the importance of child care and acknowledged the need for greater government assistance in increasing provision. While certain pilot projects have been initiated in an effort to begin implementing this policy, no major changes have been made to the concrete situation regarding provision of child care. It is suggested that this is based on a number of possible factors:

1. The new Education Department has had to lurch from crisis to crisis (teacher pay demands, poor pass rates, racial conflict in schools etc) because of the shambles created under the previous governments.
2. The legacy of multiple education and welfare departments for different race groups and Bantustans has to be overcome.
3. ECD was never provided consistently by previous governments so never achieved the status of a permanent and essential feature of the education system.
4. The new Department of Welfare has been engaged in a battle with civil society bodies over the allocation of child maintenance grants. These were deracialised and initially set at R75 per child under seven per month. Due to pressure this amount was increased to R100 per child under seven per month. The Welfare Department has been severely constrained by its budget and has had to face the enormous task of addressing poverty in a country where the majority of all South Africans (53%) and almost two-thirds of all children under five years of age (60%) live in poverty.⁵²
5. The government's current economic policy, Growth, Employment and Redistribution

⁵¹ RDP Office, Office of the President, South Africa, (1995) Children, poverty and disparity reduction : towards fulfilling the rights of South Africa's children. Pretoria: Office of the President.

⁵² RDP Office (1995) op cit, at 20.

(GEAR) aims at economic growth, debt reduction and consequently, reduced social spending. This policy, together with the reality of severely limited resources available for budgetary allocation, means that there are serious financial constraints in the way of extensive child care provision.

6. Previous government provision of child care was either educational or custodial. The educational model was based on a relatively costly, first world model of pre-school, centre-based provision. These preconceived ideas and Departmental differences need to be overcome before a new model of child care can be created.
7. The trade union movement has been relatively unassertive in pushing the private sector and government to provide child care. The Congress of South African Trade Unions (COSATU) held a child care campaign in the early 1990s⁵³ but since then have not taken up the issue at national level. The challenges facing the union movement in a recessionary economy have seen it fighting for its survival. Also, patriarchal attitudes within the union movement mean that women's demands are rarely placed at the forefront of union agendas.⁵⁴ Consequently, workers have not created significant pressure on employers to change their attitudes towards child care provision.
8. As discussed in the introductory chapter, broader patriarchal relations in society result in the sexual division of labour. Women are relied upon to care for children despite the difficulties this imposes on them. Because of gender oppression in society, demands for increased child care are neither strongly asserted nor are they taken very seriously by those with the power to change the current situation. The lack of a strong, organised women's movement campaigning for this issue may mean that other pressure groups are more likely to win their demands for social change first.

2.1.5 Options to increase Child Care provision

⁵³ See Dove, F (1993) "Women and collective bargaining : parental rights" in *South African Labour Bulletin*, Volume 17, Number 1, 52, at 55-6.

⁵⁴ This is recognised by COSATU (1997) in The Report of the September Commission on the future of the unions, Johannesburg: COSATU, Chapter 8. The report calls for a COSATU child care and parental rights campaign. At its 6th National Congress in 1997, COSATU resolved to campaign for child care in the workplace.

The government has committed itself to improve child care provision.⁵⁵ While government policy has not been fully developed into an implementable plan and state resources have not been adequately allocated for this purpose, there are a number of important features of government commitment to child care. Firstly, there is a recognition that child care is not simply a need of parents who have formal employment. Farm workers, women who have to travel long distances to fetch water, unemployed people looking for work and informal sector workers such as street hawkers, also require child care provision if they are to function productively in society. Secondly, there is an acknowledgment that child care and the educational and health services that come with it are a requirement for the development of millions of South African children. Thirdly, the government realises that a western model of centre-based child care is inappropriate and unrealistic in South Africa. Fourthly, it knows that increased provision will have to be coordinated inter-departmentally and together with existing non-governmental service providers. Finally, it realises that the costs of child care cannot be borne by any one group alone and that parents, the state, the community and the private sector (and possibly international donors) will have to contribute towards improved delivery.

The real issue in South Africa is what form child care should take if the greatest number of people in need are to be reached taking into account quality, cost and the specific conditions of our country. A number of studies have been undertaken and different options proposed but none of these are comprehensive. Part of the government's ECD pilot project involves the development of policy and a programme for implementation. The question this raises is whether the government's stated commitment to child care will be sustained over time and whether child care will be seen as a priority for the allocation of resources in the future. The current (small) budgetary allocation is an indication that improved child care provision will only become a reality if pressure from civil society is maintained and increased.

Some of the options for child care which have been proposed by various groups will now be set out. The value of doing so is to highlight some of the debates and hard questions that arise from considering different options. This discussion assists in understanding whether and how to use the Bill of Rights to achieve improved child care provision (in the following chapters). While

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See 2.1.4.4 above.

these options will be commented on to some extent, this study cannot provide its own model as this is obviously beyond its scope and the area of expertise of the writer.

2.1.5.1 *NALEDI's report*

Naledi is a research institute set up by the Congress of South African Trade Unions (COSATU). It produced a research report on child care in May 1996.⁵⁶ In a disclaimer it states that while it adopts a pro-labour perspective, its conclusions do not represent the policies of COSATU.

Naledi puts forward a number of possible and not mutually exclusive options for child care which include consideration of who is to fund the option and who has control over the provision of that option. The options are:

1. Those funded by employers alone which include workplace centres, community centres, company multi-small centres (the employer sets up more than one centre, possibly in the community and near to the workplace);
2. Those funded by the government alone which include local authority-based centres and pre-primary schools;
3. Those funded by parents and employers which involves using existing private facilities where the employer makes some contribution towards the costs;
4. Those funded by employers or government in the form of a wage subsidy or voucher system. The report notes that the government already subsidises some child care provision and provides a tax concession for earners with children. This could be improved by providing employers with a tax concession for assisting workers with child care;
5. Those funded by parents and government which Naledi calls the 'Columbian Model'. This is a 'low-cost, mass-based model which relies on existing homes and informal structures...a government supported child-minding model'.⁵⁷ The state provides

⁵⁶ Naidoo, R, Nyman, R and Caga, X (1996) Starting early : a child care provision framework for workers. Johannesburg : Naledi

⁵⁷ Naidoo (1996), op cit, 28.

housemothers with training, health and nutrition services while families pay a small fee and practical assistance to the housemother. The state supplements the housemother's salary.

6. The final option is that of a union fund to which employers, workers and the government contribute. The fund may also undertake fundraising from other donors and could be used in a range of ways to fund child care for workers.

Naledi then rates these options in terms of five criteria that serve the interests of trade union members. These are cost, worker control, location (convenience for workers), quality of care, national applicability across industries and areas. Based on this rating system, the options that score the highest are the company multi-centre option and the 'Columbian Model'. The study finds that only these two plus the use of existing facilities are generally applicable to all workers. The union fund could also be but it is seen as a supplementary option.

Based on these research findings, Naledi provides some detail for its recommendations for the development of a national child care framework. The report stresses joint negotiation and planning with all the major stakeholders which empowers workers, parents and communities so that 'pressure for a redistributive system can be maintained'.⁵⁸ The 'Columbian Model' could be financed at a cost of R3 billion a year if R50 per month per child for five million children is spent. This option would create thousands of jobs. In the longer term, the quality of child care within such an option would have to be improved. This model should be piloted. Alternatively, the poorest one million children should be provided with more expensive centre-based care at a cost of R250 per child per month at a total cost of R3 billion a year. Naledi provide a rough calculation and concludes that 330 000 new jobs would be created. The growth of a child care industry with related expenses would provide further jobs and opportunities. Naledi makes a number of useful suggestions for the improvement of government delivery in this area.

The Naledi report is creative attempt to look at practical solutions to the problem of child care. It is commendable in its recognition that the need for child care goes well beyond the formally employed workforce. It is however, only a preliminary study in that it fails to provide detailed

proposals regarding the 'Columbian Model' or the financing of its options. It is an important contribution to the debate since it moves away (to some extent) from a traditional, first world, centre-based conception of child care.

2.1.5.2 *The World Bank study*

This study was produced by the Centre for Education Policy Development (an NGO) together with the World Bank in August 1994.⁵⁹ It is the most comprehensive and influential study to have been written on the subject and has to a significant extent informed government policy. Its premise is that five-year olds need to be brought into the formal education system but it also stresses the need for a programme for the most disadvantaged children between the ages of nought to five. The study is relatively comprehensive in drawing on all available data to support its findings and costings. Its value is that it sets out a detailed plan of action for government structures to implement the recommendations.

The World Bank study recommends the phasing in over five years of a reception class for all five year olds. This would be the primary responsibility of the ECD Department within the Education Department. This is the more formal dimension of child care delivery proposed. It presents the following options for children under five which are based on existing forms of child care. These include:⁶⁰

1. Full-day services either in educare centres or home-based educare. The latter is favoured for under threes because of the lower adult/child ratio, its flexibility, and existing wide use. The state would have to ensure that these homes received support services;
2. Part-day child-oriented services whether in informal play-groups or pre-school centres;
3. Family Education Programmes aimed at training parents/caregivers in stimulation and child care and in providing nutritional support. There is an existing programme called HIPPY where a trainer visits homes to provide this support. The other type of family education is through parent and child groups where playgroups are combined with regular

⁵⁹ Padayachie, R, Atmore E, Biersteker, L, King, R, Matube, J, Muthayan, S, Naidoo, K, Platjies, D, Evans, J (1994) Report of the South African Study on Early Childhood Development: Recommendations for Action in Support of Young Children. Washington, DC: The World Bank

⁶⁰ Padayachie (1994), op cit, 68-9.

training and support sessions for parents. The latter option is more suited to children over three and the former for children under three.

The report envisages that all of these forms of child care and support services will be used depending on the need for full-day care in an area and the existence of NGO provision.

The World Bank study undertook a costing of its recommendations increasing by year from 1995 to 1999. These are divided into training costs (R192 million for 1999); services for nought to four year olds including nutrition and parent education (R3272 million for 1999); services for five year olds including full day care, the reception year, classrooms and equipment (R1306 million for 1999). The overall total for these services ranges from R1,135 million in 1995 to R4,770 million in 1999. The report proposes that the state cover the costs for all five year olds. It would however, only cover the costs of a targeted population of under fives based on need by way of a subsidy. The report also recommends tax concessions to encourage investment in child care. One of the important recommendations of the study is the emphasis on community responsibility for ECD facilities. Based on the experience of the former Bophuthatswana Pre-primary programme, parents would be required to construct and maintain the physical facilities where there are none. The state would provide loan financing and would pay for teacher salaries but parent fees would have to be used for food, equipment and support staff. The report says that this model, while not wholly appropriate, could be considered as a basis for other forms of community responsibility.

The World Bank study is extremely practical and useful in offering the government a plan of action for five year olds. It is less concrete with regard to provision for under fives. Nevertheless, some of the organisational structures which it proposed for government and the research findings are useful in developing a programme for under fives. Unlike the Naledi model, the study seems to be less concerned with national uniformity and equal access and suggests that the government rely on existing services and a subsidy system. The study does not explore the access implications of such a proposal and therefore fails to really address the needs of parents of under fives. Atmore, in supporting the World Bank study, argues that subsidy systems are the 'best means for supporting community control, because they can provide for choice and real decision-making

about programme options. They can also be structured in such a way as to meet the demands of bringing about equity and redress existing resource imbalances'.⁶¹ Both the Naledi and World Bank studies reach the figure of approximately R3 billion needed per year for universal access to child care. Atmore notes that while such an amount would put strain on government's resources, the amounts required are 'modest' compared with the cost of primary, secondary and tertiary education and the budgets of other government departments. He says the question is not whether we can afford this but whether the country can afford not to provide ECD services for its children.⁶²

2.1.5.3 Liddell and Kemp's paper

In an article prepared under the auspices of the HSRC in 1991, Liddell and Kemp⁶³ look at the priorities which affect choices of child care provision options. They discuss four models

1. State-run preschool for all children. The authors note that only very few first world countries (such as Sweden) are able to provide this. Most industrialised countries provide for between one quarter and one half of children. This model would cost US\$3.8 billion which amounts to an increase of 72% on 1991 expenditure on education which will have to increase enormously to achieve racial parity in education. They suggest that given the budgetary realities and the traditionally low priority given to preschool provision, this option is 'totally unrealistic'.
2. Privatising all preschool services. Liddell and Kemp say that donor support for pre-school is small and that parents simply cannot afford to pay any more than they already are.
3. Targeting underprivileged children only. The authors suggest that this would provide little assistance in the South African context as 'virtually every black South African child is underprivileged by international standards'.⁶⁴ A more selective approach within the

⁶¹ (1996), op cit, 20.

⁶² (1996), op cit, 25-6.

⁶³ Liddell, C and Kemp, J (1991) Current Issues for Day Care in South Africa. Pretoria: HSRC

⁶⁴ (1991), op cit, 10.

black community is needed.

4. Targeting underprivileged children of working mothers. The authors cite statistics of 30-40% of black women being working mothers. Assuming some of these wished to use family or community based child care arrangements instead of state supported centre-based care, about 30% of black children would have to be accommodated. Also assuming current levels of private sector sponsorship and parent fees were incorporated, the government would have to provide US\$719 million per annum being an increase of 14% to the overall education budget. Liddell and Kemp caution that this is a 'deeply conservative model' since it only provides for 30% of underprivileged children.

In discussing these options, the authors question the economic value of providing preschool education for South African children. They note international studies which show that levels of per child investment have to be extremely high if they are to have any lasting educational investment. They suggest that an investment of US\$800 per child per year is unlikely to result in children's greater success at school in later years, particularly where the school system is inadequate. As a result of this finding, the authors suggest that a shift in emphasis may be necessary away from educational services towards day care for working mothers. Resources could then be channelled into improving primary education as a solution to high failure rates rather than relying on preschool provision for this purpose. The article challenges the only South African longitudinal study of the effects of preschool education (by Short and Biersteker, 1985) by arguing that it studied a sophisticated enrichment scheme rather than the average preschool centre. They thus challenge the 'predominantly educational focus of preschool professionals'.⁶⁵

Liddell and Kemp also note the benefits of quality day care. It provides mothers with opportunities to work and thus better living standards for themselves and their families. Uplifting the economic and social status of mainly single, black women would contribute towards a broader development programme. Child care provision would be of a higher quality in state supported day care centres and would offer children greater benefits than custodial care. Finally, the authors call for increased research into child care if any option is to be properly motivated in the South African context.

⁶⁵ (1991), op cit, 16.

The article is extremely challenging as the child care sector is dominated by expertise in the educational field which may inform many of the options proposed. The article is somewhat outdated and also provides no detail as to the way in which such a model could be implemented. It does however highlight the importance of clarifying the social need that any child care programme aims to meet and stresses that research is critical if we are to develop any meaningful solutions in this country.

The three studies discussed above point to the complexities of policy-making in this area. They make it clear that a policy is desperately needed for a number of different reasons which include: the needs of working parents, the needs of poor mothers, the educational and care needs of children and the development of the country as a whole. These studies indicate that rights arguments for child care must take account of the particular needs of South Africa and must benefit from the research both here and internationally looking at effective means of providing the best and most appropriate child care to the most children. Thus, a court challenge to require a company to provide child care facilities, for instance, must consider whether the facilities asked for should be primarily custodial or oriented more towards educational provision. Rights arguments need to go hand in hand with other strategies to challenge the government to deliver services in this crucial area. For example, a court challenge to compel the government to provide child care for all its employees should go hand in hand with a research and advocacy project looking at how such a scheme should operate. The studies also show that improved child care will be enormously costly and will involve careful planning and implementation. The already stretched resources of government will obviously be an important issue when considering limitations of constitutional rights. The later chapters on the right to equality and citizenship argue for a right to child care with these issues in mind.

2.2 CHILD CARE PROVISION IN OTHER COUNTRIES

The chapter now looks at some of the options and insights emerging from the international literature. This survey of international laws and policies does not claim to be comprehensive and many regions of the world such as Eastern Europe, Asia and the Indian sub-continent have not been examined. This is partly as a result of accessibility of material. It is also because this section

aims to give an overview of some of the mechanisms used to provide child care facilities, illustrated by way of the example of certain countries, rather than give detailed evidence of the position everywhere in the world.

This section shows how different countries have approached the issue of child care provision in very different ways. While some of the approaches used are inappropriate or simply not affordable in South Africa, much can be learned from these countries' experiences. As in the section above, this shows us that rights arguments for improved child care provision can be framed in a range of different ways and thus need to be carefully formulated to meet the needs of the specific recipients.

2.2.1 State Provision of child care: Scandinavia

With the decline of the former Communist countries, Scandinavia remains the leading example of extensive, state-provided child care. Access has come to be regarded as a 'democratic social right', although neither Norway, Sweden nor Denmark realise the right through unconditional universal access to public day care.⁶⁶ Demand still exceeds supply although there are high levels of provision in Sweden and Denmark.

Leira argues⁶⁷ that the child care policies of the social democratic welfare states of Scandinavia are a response to the dramatic increase in women's employment in the last 30 years. Since women were the only available labour reserve they had to be brought into the workplace. By 1988, the majority of women with children under the age of nine (70-80%) were employed. The changing form of families required a reorganisation of the relationship between the labour market and the family. Two responses were developed. Firstly, extensive leave was provided for pregnancy, the early period of a child's life and children's illnesses. Secondly, high quality, state sponsored child care was provided.

⁶⁶ Leira, A (1993) "Mothers, Markets and the State: A Scandinavian 'Model'?" in *Journal of Social Policy*, Volume 22, Issue 3, 329, at 337-8.

⁶⁷ Ibid.

Child care centres accept infants from an early age and cover the first three years of life. From age four to seven (when children start school) the kindergarten takes over, although both are usually located on the same premises.⁶⁸ There is an equal emphasis on the care and educational components of child care which are closely integrated. National provision and policy is regulated in law by central government. Delivery of services is the responsibility of local authorities but there have been recent moves to increase the decision-making powers of these authorities. Leira⁶⁹ notes a tension between local autonomy regarding provision and the principle of equality of access since significant regional differences have emerged in the form and content of services where local authorities have had greater say.

Leira⁷⁰ suggests that Scandinavian child care policies have satisfied the demands of 'the production of labour' but have been less successful in meeting the demands of 'social reproduction'. Many features of the gendered division of labour and the provision of unpaid work by women remain a concern in Scandinavia with men still playing a much smaller role than women in the care of children and the housework.

2.2.2 State Subsidies for child care: Australia

The Children's Services Programme (CSP) in Australia aims to help 'families with dependent children participate in the workforce and in the general community'.⁷¹ Commonwealth (federal) support for child care takes the form of regulation of child care facilities (in the Child Care Act, 1972) and a child care rebate (in the Childcare Rebate Act, 1993).⁷² The rebate scheme is available for a family's work related child care expenses. The significant feature of this

⁶⁸ Hechinger, G and Hechinger, F.M (1990) 'Child Care in Scandinavia: An informal report' in *Teachers College Record*, Volume 92, Issue 1, 39.

⁶⁹ Op cit, at 339.

⁷⁰ Op cit, at 344-5.

⁷¹ Australia. Law Reform Commission (1993) Child care: review of legislation administered by Department of Health, Housing, Local Government and Community Services, Sydney: Australia Law Reform Commission, at 5.

⁷² South African Law Commission (1998) The Review of the Child Care Act, First Issue Paper, Issue Paper 13, Project 110, 149.

legislation is that work is defined broadly to include full or part-time work, study, training or looking for work. Unlike the Canadian tax rebate (discussed below), this subsidy is paid directly to parents and is provided for work seekers, recognising that child care services may be most needed by people not yet employed or paying tax.

There is also Commonwealth child care assistance directed at low and middle income families who are entitled to reduced fees for child care services and special child care assistance for families who have suffered severe and sudden financial hardship. In addition to federal support, territory and local governments provide substantial funds for establishing services. The Australian child care system is part of a broader system of family support. A Basic and Additional Family Payment is made to parents with dependent children in need.⁷³

2.2.3 Tax rebates for child care: Canada, USA and some Western European Countries

The shortage of affordable child care in Canada (approximately 15% of children needing full-time care are catered for in registered child care) is regarded as a severe constraint on women's economic participation.⁷⁴ Significant numbers of women are required to engage in part-time work for lower wages and less career prospects. Child care is funded largely through a deduction allowed under the Income Tax Act. The deduction covers babysitting, day nurseries, boarding school and camp fees and is provided to enable the taxpayer to engage in employment or receive certain occupational training. Young⁷⁵ argues that while the policy behind the deduction is to enable women to move from the private sphere of the home to the public sphere of employment, the policy has a privatising effect on the child care services offered. Thus, public funds are not spent on developing facilities but go towards private, profit-making services.⁷⁶

⁷³ Naidoo et al (1996), op cit, 9.

⁷⁴ Young, C (1997) "Public Taxes, Privatising Effects, and Gender Inequality" in S Boyd (ed) Challenging the Public/Private Divide. Feminism, Law, and Public Policy, Toronto: University of Toronto Press, 307

⁷⁵ Ibid, at 310.

⁷⁶ It should be noted however, that child care workers are the lowest paid professionals in Canada despite the lack of available services - their work is often invisible and undervalued. Many of these women are immigrants and find themselves vulnerable to exploitation and abuse.

Women who are looking for work, studying or have no earned income have no access to the tax deduction. While women form the majority of the poor in Canada, it is single mothers who are the poorest of all. They do not benefit from the tax deduction. The major shortcoming of the deduction (as opposed to a tax credit) is that it discriminates against low income taxpayers because the "value of the deduction is tied to the rate at which the taxpayer is taxed".⁷⁷ Thus, those who earn more are entitled to a greater benefit. A tax credit, on the other hand, has the same monetary value for all taxpayers so would operate more equitably.

Some of these issues were the subject of consideration by the Canadian Supreme Court in the 1993 case of *Symes v. Canada*⁷⁸. Symes, a partner in a law firm, claimed that her child care expenses were deductible as a business expense (since the child care deduction only met a portion of her expenses). The case dealt with both statutory interpretation of the Income Tax Act and with the constitutional argument that denying Symes the deduction was discriminatory. Symes lost the case as the majority of the court held there was no allowable deduction and no discrimination. An interesting feature of the case was the argument that allowing self-employed women the deduction would increase their privilege and the inequality between poor and rich women. (This case is discussed in greater detail in Chapter 3 dealing with the right to equality and child care).

Young⁷⁹ suggests that in Canada, for strategic reasons and despite its flaws, the tax system should be used better for the funding of child care. This is mainly because the government has continued to show a reluctance to fund child care directly (by way of grants or provision of facilities). She proposes tax subsidies for those establishing and running child care facilities; zero-rating the cost of child care for the purpose of Goods and Services Tax; advertising the existing deduction of which many taxpayers are unaware; a tax credit rather than a deduction the value of which would not depend on the taxpayers tax rate; extension of eligibility to the benefit by work seekers; and providing the benefit up-front and monthly so that people with low incomes that are not required

⁷⁷ Young, C (1994) "Child Care - A Taxing Issue?" in *McGill Law Journal* Volume 39, 539 at 545.

⁷⁸ *Symes v. The Queen: Attorney General of Quebec, Charter Committee on Poverty Issues and Canadian Bar Association (Interveners)* [1993] 19 C.R.R. (2d), hereinafter referred to as *Symes*.

⁷⁹ (1994), op cit.

to pay tax do not have to wait for tax returns to be filed.

Teghtsoonian,⁸⁰ in examining the ideological forces at play in Canada (and the USA) finds that social and economic conservatism are central to 'legitimizing opposition to federal funding for child care as a universal service to families'.⁸¹ Economic conservatism approaches the issue of child care as one of affordability. Teghtsoonian says that decisions about whether a government can afford a particular policy are not about the absolute availability of resources but instead reflect the priorities of that government. It is here that social conservatism impacts on policy by containing a preference for full-time mother care within the 'traditional family'.⁸²

The United States of America has what has been described as a child care 'nonsystem, a collection of ad hoc, uncoordinated arrangements'.⁸³ The federal government provides a tax credit, its single largest expenditure on child care, to the benefit of mainly middle class families. But the credit is non-refundable and thus supports those with substantial tax liabilities - those with substantial taxable incomes. There is also some subsidisation of low-income families. The remaining federal funds are channelled to states and local governments who allocate funds and play some role in child care provision.⁸⁴ Most child care is privatised, costly and limited. Thus, many women's job choices are affected by lack of affordable child care.⁸⁵ Child care is the fourth

⁸⁰ Teghtsoonian, K (1995) "Work and/or Motherhood: The Ideological Construction of Women's Options in Canadian Child Care Policy Debates" in *Canadian Journal of Women and the Law* Volume 8, Number 2, 411; (1996) "Promises, Promises 'Choices for Women' in Canadian and American Child Care Policy Debates" in *Feminist Studies* Volume 22, Number 1, 119; and (1997) "Who pays for caring for children? Public policy and the devaluation of women's work" in S. Burd (ed) Challenging the Public/Private Divide: Feminism, Law, and Public Policy. Toronto: University of Toronto Press, 113.

⁸¹ (1996), *ibid*, at 123.

⁸² (1997), *op cit*, at 120.

⁸³ Strober, M.H and Dornbusch, S.M (1988) "Public Policy Alternatives" in Dornbusch, S.M and Strober, M.H (eds) Feminism, Children and the New Families. New York: The Guilford Press, 327 at 339.

⁸⁴ Pitegoff, P (1993) "Child Care Enterprise: Community Development and Work" in *The Georgetown Law Journal* Volume 81, 1897, at 1905-6.

⁸⁵ Skold, K (1988) "The interests of Feminists and Children in Child Care" in Dornbusch, S.M and Strober, M.H (eds) Feminism, Children and the New Families. New York: The Guilford Press, 113, at 123.

largest expense for working parents at all income levels after food, housing and taxes which hits poor families the hardest.⁸⁶

The history and current policy regarding child care in the USA is, like the Canadian policy, based on an ideology that largely privatises social reproduction. While there is some state provision of funds to families in need, these are relatively small. Little effort has been put into regulating provision or investing in facilities. Many of the American writers look to Canada as an example of a government that has at least displayed a commitment to implement a coordinated national child care programme. Skold⁸⁷ suggests that improving the child care situation in the interests of women and children in the USA, requires social and economic changes beyond the child care system. These would include pay equity for men and women and improved maternity and parental care benefits, including those that encourage fathers to take time off work to attend to children.

The situation in European Union countries is somewhat better than that found in North America with greater state acknowledgment of its role in providing pre-school care. But most publicly funded child care is provided for children over the age of three, indicating the emphasis on nursery education for the development of children, rather than day care to assist working parents.⁸⁸ The vast majority of children between three and the compulsory school age (80%) have access to pre-school education in Denmark, France, Italy and Belgium, while almost as many (between 60-80%) have access in Spain, Greece and Germany. The most limited provision is found in the Netherlands, Ireland and the United Kingdom where state child care services are generally only available to children 'at risk'. In most countries there are insufficient public or private facilities available for the entire population's child care needs.

⁸⁶ Thomsen, M (1996) "The Role of Business and Government in the Provision of Child Care Assistance: A Comparative Analysis of the United States and Canada" in *University of Pennsylvania Journal of International Economic Law* Volume 17, Number 4, 1209, at 1213.

⁸⁷ (1988), op cit, 127-134.

⁸⁸ Commission of the European Communities (1990) *Childcare in the European Communities 1985-1990*, Brussels: Commission of the European Communities, at 9-12. Also see Randall, V (1996) "The Politics of Child Care" in *Parliamentary Affairs*, Volume 49, Part 1, 176.

2.2.4 Laws requiring employers to provide/fund child care: Some Latin American Countries

In Western Europe and North America where the state has faced the challenge of removing obstacles to women's labour market participation, it has provided some publicly funded child care. While this provision has been inadequate, employers have not been required to subsidize facilities for workers, possibly because the state has not wished to impede private sector growth. In contrast, in some Latin American countries, the state has introduced laws which require employers to subsidize child care for workers. This may be because the state does not have the resources to address the issue and is less concerned with imposing economic burdens on the private sector. In a number of these countries, however, the laws requiring employer funded child care are poorly enforced.

In a World Bank study⁸⁹ of six Latin American countries, the author found that some of these laws actually impair women's access to employment as companies avoid employing more than a certain number of women. This is the case in Chile and Brazil where employers are required to provide child care facilities if they employ more than a certain number of women (19 in Chile and 30 in Brazil). In Brazil, these laws arise from their Constitution of 1988 which states that all workers should have access to free day care and preschool for 0-6 year olds. A study in Brazil of the impact of poor child care provision on working mothers found that women were prevented from participating in the labour force. It also found that teenage daughters and other female relatives were seriously affected by the child care they were expected to provide and this often jeopardized their education.⁹⁰ Despite poor enforcement of the laws requiring employers to sponsor child care, employers chose to avoid the risk of being fined by keeping numbers of women workers down.⁹¹

⁸⁹ Winter, C (1994) Gender Discrimination in the Labor Market and the Role of the Law: Experiences in six Latin American Countries. Washington: World Bank, 251-2.

⁹⁰ Connelly, R, DeGraff, D.S and Levison, D (1996) "Women's Employment and Child Care in Brazil" in *Economic Development and Cultural Change*, Volume 44, Part 3, 619, at 648-9.

⁹¹ Winter, C (1994) *ibid*.

In Columbia two public programmes have been introduced to provide child care for all workers. These are the creation of centres for preschool children and a system of Community Mothers supported by the state. These programmes are funded by a 3% tax on payrolls in public and private enterprises.⁹² In Costa Rica workers have a right to child care which is financed by government and parents depending on their ability to pay.

2.2.5 No state assistance with child care: Developing Countries - the examples of Thailand, Guinea and Nigeria

In countries of the developing world, child care remains largely privatised. It is rarely provided by the state and is usually only available to the wealthy. Richter⁹³ shows how the impact of urbanisation and the increase in employment of women has led to the development of various child care strategies by women. A significant strategy is for women to live separately from their children who are then cared for by grandparents or others in rural areas (sometimes in exchange for payment). In Thailand, where migration levels are high, many employers adopt policies of hiring only single women and replacing workers as they marry, become pregnant and age. This applies to both blue and white collar workers who are forced to live apart from their children. Richter⁹⁴ suggests that this trend occurs in many parts of the world where there is rapid urbanisation, increased employment of women and lack of child care facilities.

Few African countries provide any state supported child care and private facilities are also scarce. Research in Guinea⁹⁵ has shown that when women work, they usually spend less time on caring for children which has a negative effect on the health and nutrition of young children. (Their mothers do not breast feed, prepare nutritious foods or provide them with medical care). At the same time, women's earnings raise household food consumption more than earnings of men

⁹² The 'Columbian' model is one of the options supported by Naledi in its proposals for child care provision in South Africa. See 2.1.5.1 above.

⁹³ Richter, K (1996) "Living Separately as a Child-Care Strategy. Implications for Women's Work and Family in Urban Thailand" in *Journal of Marriage and the Family*, Volume 58, 327

⁹⁴ Ibid, at 336-7.

⁹⁵ Lang, S.S (1997) "African mothers who face work dilemma" in *Human Ecology Forum*, Volume 25, Issue 4, 23.

(who often spend the money on their own needs). While the household may benefit overall, young children suffer and female siblings' education is often compromised.

This is confirmed in a study conducted in Lagos, Nigeria.⁹⁶ With increased levels of employment of women, mothers are struggling to take care of their children. Female relatives such as grandparents are unwilling to spend significant time in the city as conditions are cramped and the environment is hostile. Children of poor relatives used to be sent to urban areas to care for children in exchange for some education or training. But increased availability of education in rural areas makes this no longer necessary. A large number of private child care facilities, of various degrees of quality and cost, have sprung up in Lagos. While the government has recognised the problem of lack of child care, it has only played a role in promoting and regulating child care. It has not funded any child care provision.

2.3 IMPROVING CHILD CARE PROVISION IN SOUTH AFRICA: SOME SPECIFIC RECOMMENDATIONS FOR LAW AND POLICY REFORM

The history and current status of child care in this country requires that a clear decision needs to be made by the state as to whether the historically private care of children by women will become a public responsibility of the whole society. Even when such a decision has been made, the government will still have to address some important questions concerning the type of provision and the funding of such provision. Some of the proposed options for funding and providing child care have been discussed above. This study does not attempt to engage with the economic viability or logistics of these options nor does it try to argue for any particular option. What it will do here is draw out some of the more specific recommendations for law and policy reform that emerge as lessons from the international experience or that have been put forward in the South African literature. Many of these recommendations are of value regardless of the particular option chosen for provision.

1. *Tax deductions:* The Canadian and US experience shows that these are only of assistance

⁹⁶ Fapohunda, E.R (1987) "Urban Women's Roles and Nigerian Government Development Strategies" in C.Oppong (ed) Sex Roles, Population and Development in West Africa. London: James Currey

to middle class parents who earn sufficient income to obtain some benefit from a tax deduction. The tax system can and should be used creatively to encourage investment in child care by businesses and to assist tax paying parents. But since millions of South Africans fall outside of the formal income tax system and require child care assistance, the state will need to find other mechanisms for delivery of such services. An additional suggestion⁹⁷ is that tax laws be amended to encourage companies to make deductible donations to child care facilities.

2. *Access by the unemployed:* As the Australian system shows, any provision of child care support must be available to work seekers and those training for work, and certainly not just for those in formal employment. Our South African conditions create particular challenges in this regard due to the high numbers of informal sector workers, the unemployed and rural parents who appear to be based at home but actually spend many hours a day collecting water, firewood etc.
3. *Programmatic child care provision:* Child care must not be viewed simply in terms of its custodial or educational functions. Provision should ensure that a range of needs are met in one programme. Thus, nutrition, health care, maternal health and other such public development concerns should be addressed in any child care programme. The Scandinavian countries have developed a holistic approach to the child, mother and family from pregnancy through to schooling.
4. *Flexibility:* The Naledi report highlights some of the specific features of the South African context. Workers often live far from home and have to use transport which may be expensive and even dangerous for children.⁹⁸ Thus, while work-based child care may assist some parents, other forms of child care should be available near the home. In addition, cost and logistical difficulties may require that home-based rather than centre-based care is needed if large scale provision of child care is to be made available. The

⁹⁷ Made by Debbie Budlender of the Community Agency for Social Enquiry, interview on 29 August 1997 in Cape Town.

⁹⁸ Naidoo (1996), op cit, at 23.

'Columbian model' proposed by Naledi, which provides child care centres and home-based 'Community Mothers', recognises the need for a combination of arrangements.

5. *Community Involvement*: This relates to the above point and was also stressed in the Naledi report and the World Bank study.⁹⁹ Where parents and other community members are involved in child care projects there is a sense of ownership and social investment. This means that rather than seeing child care simply in terms of an entitlement, communities take some responsibility for its management and provision.
6. *Recognition of women's child care needs*: A mere handful of shops and services used by the public offer nappy changing tables, nursing rooms or creche facilities for parents who need to use these. There are almost no such facilities at courts, government offices, post offices etc. This often means that the burden on women with children tackling the state bureaucracy is worsened and highlights the assumption that the average state client is a man without child care obligations.
7. *Obligations on employers*: The Latin American experience is important in warning that any measures that compel employers to support women workers may lead to reduced employment of women. This means that benefits for women employees should be funded by all employers regardless of whether they employ women or not. For example, the current system of maternity leave pay via the Unemployment Insurance Fund is generated by contributions from all workers and employers. The costs of the benefit should be socialised rather than privatised so that everyone takes responsibility for the costs of child care which are socially necessary.
8. *Unified child care legislation*: The provision of ECD, regulation of child care and other matters related to child care are located in a confusing range of sources.¹⁰⁰ This contributes to the already fragmented nature of ECD. A number of the submissions made

⁹⁹ Above at 2.1.5.1 and 2.1.5.2.

¹⁰⁰ E-mail Communication with Nonna Rudolph, Head of the ECD and Primary Education Unit of the Gauteng Department of Education, 6 April 1998.

to the South African Law Commission Project Committee reviewing the Child Care Act called for coherent and unified legislation.¹⁰¹ The new legislation needs to go beyond procedural mechanisms for children in need to provide substantive services for all parents and children requiring child care assistance. It also needs to better regulate existing child care facilities.

9. *Transforming gender relations:* Any child care programme must consider the potential impact on women whose lives are shaped by the sexual division of labour in society. For example, Burman suggests that child care centres could be staffed in rotation by members of the community, but warns that this should not result in increasing the workload of women in the community while preventing them from accessing better remunerated jobs.¹⁰² Child care provision should attempt to move away from existing structural constraints on women's full participation in society. It should also be developed so as to encourage fathers to take greater responsibility for child care (for example, by placing child care facilities where men work).¹⁰³

10. *State responsibility for child care:* All of the above recommendations point to the need for the state to take overall responsibility for child care. The state is the only institution capable of coordinating this massive undertaking, regardless of the manner in which such child care is funded ie: via a payroll tax, employer tax, by employers directly, through international aid and private sector donations, to mention just some of the possibilities. The state also needs to regulate provision of child care to ensure that it is of a high standard. It also needs to ensure that child care is used to address a range of needs including the health, nutritional, educational and custodial needs of children together with the needs of parents.

The discussion in this chapter has an important bearing on the development of the constitutional

¹⁰¹ See, for example, Newman (1998), op cit, 26.

¹⁰² For more on this point, see Burman, S (1991) "Capitalising on African Strengths: Women, Welfare, and the Law" in *South African Journal of Human Rights* Volume 7, Part 2, 215 at 219.

¹⁰³ As suggested by C Moser, referred to above at 1.3.5.

right to child care, set out in the following two chapters. Constitutional rights need to be understood within the context of South Africa's particular history and needs regarding child care. These rights have to be formulated so that they can be applied practically and appropriately to our unique circumstances. We need to learn from the experiences of other countries and consider options for our country based on thorough local research.

CHAPTER THREE: THE RIGHT TO EQUALITY AND CHILD CARE

In this chapter it will be argued that the right to equality in our Bill of Rights can and should accommodate the claim for provision of child care. This argument is based on an interpretation of the Constitution as a whole and the equality right in particular as requiring substantive equality if the purpose of our Constitution is to be fulfilled. The chapter first sets out the argument that the equality right should entail the provision of child care. In so doing, it sets out the meaning of substantive equality and discusses how the equality right should be interpreted. It also considers the location of the issue of child care within the different sub-sections of the equality clause. Then, there is a discussion of the equality jurisprudence of our courts and consideration is given to whether this approach to equality can accommodate child care as argued in this thesis. Certain criticisms of the courts conceptual approach and its' application of its' equality test are discussed. Thereafter, the chapter looks at the thorny issue of justiciability of substantive rights in considering limitations of the right. Finally, there is a discussion of ways in which the issue of child care brought under the equality right might reach the courts. The example of the Canadian *Symes* case is discussed and analysed.

3.1 CHILD CARE AS AN EQUALITY RIGHT

3.1.1 The right to equality

South Africa has a comprehensive equality right in its Bill of Rights¹ which offers everyone 'equal protection and benefit of the law'; includes an anti-discrimination clause; and permits measures to promote equality where people have suffered unfair discrimination. It reads as follows:

Section 9. Equality. -

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the

¹ S 9 of the Constitution of the Republic of South Africa 1996, Act 108 of 1996, hereinafter referred to as 'the Constitution'.

achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

S 9(4) explicitly extends the application of the right horizontally by requiring non-discrimination from all persons, not just the state. This makes the equality right different from all others in the Bill of Rights and makes the application enquiry² unnecessary in relation to the anti-discrimination aspect of the right.³

3.1.2 Equality within the Constitution

Equality has a special place within South Africa's Constitution. It is the first of the rights in the Bill of Rights. It is also referred to in a number of places as a core value of the Constitution and of the new democracy. The value of equality plays a role in giving meaning to the Constitution while the right is the mechanism for realising the fulfilment of equality.⁴ The Preamble to the Constitution says that one of the reasons for adoption of the Constitution is to 'lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law'. In Chapter 1, which sets out the

² In s 8 of the Constitution.

³ Kentridge, J "Equality" (1996) in Chaskalson, M, Kentridge J, Klaaren, J, Marcus, G, Spitz, D and Woolman, S Constitutional Law of South Africa, Kenwyn: Juta 14-58.

⁴ Albertyn, C and Goldblatt, B (1998) "Facing the Challenge of Transformation: The Creation of an Indigenous Jurisprudence of Equality" in *South African Journal of Human Rights* Volume 14, Part 2, 248, at 249.

Constitution's founding provisions, s 1 of the Constitution states that the Republic of South Africa is founded on the values of :

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the Constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

While s 3(2), dealing with citizenship, states that all citizens are:

- (a) equally entitled to the rights, privileges and benefits of citizenship; and
- (b) equally subject to the duties and responsibilities of citizenship.

Within the Bill of Rights (Chapter 2), s 7(1) states that the Bill 'affirms the democratic values of human dignity, equality and freedom'. The rights in the Bill of Rights may be limited, in terms of s 36, only where 'the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. And finally, the interpretation of the Bill of Rights (s 39(1)(a)) must 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. The numerous references to equality highlight its importance within our Constitution. Along with dignity and freedom, it is one of the three central values of our society and Constitutional project.

3.1.3 Substantive equality

In interpreting the right to equality the Constitutional Court has said that the right entails

substantive rather than formal equality⁵ as well as 'remedial or restitutionary equality'.⁶ The court has stated that this latter form of equality 'is premised on a recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with'.⁷ In addition to this type of equality, the Constitution requires substantive equality where treating people identically may result in inequality.⁸ The court says that this involves a contextual examination of the impact of laws on people's lives.⁹ Substantive equality thus entails a particular methodological approach in considering whether equality has been violated since it 'requires us to examine the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld'.¹⁰ The impact of a challenged act must be considered by looking at the person claiming the violation within their networks of human relationships¹¹, contextually as well as historically.¹² This allows us to uncover systemic inequalities which exist in our society.

While the court makes a distinction between substantive and remedial equality, it is suggested that they are part of the same concept. The concept of substantive equality is used here to

⁵ *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC), at para 62 where Langa DP states 'I am unable to agree with this view which looks to formal rather than substantive equality'.

⁶ In the judgment of Ackermann J in *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others* 1999 (1) SA 6 (CC), at para 61.

⁷ *City Council of Pretoria v Walker*, op cit, at para 46.

⁸ *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others*, op cit, at para 61.

⁹ Ibid, where a passage from *Hugo v The President* 1997 (6) BCLR 708 (CC), at para 41, is cited as "encapsulating the notion of substantive as opposed to formal equality".

¹⁰ Albertson and Kentridge (1994) "Introducing the Right to Equality in the Interim Constitution" in *South African Journal of Human Rights* Volume 10, Part 2, 149, at 152.

¹¹ See Nedelsky, J (1993) "Reconceiving Rights as Relationships" in *Review of Constitutional Studies*, volume 1, 1.

¹² See L'Heureux-Dube, C (1997) "Making a Difference: The Pursuit of Equality and a Compassionate Justice" in *South African Journal of Human Rights* Volume 13, Part 3, 335. Also see the judgment of Goldstone J in *Hugo v The President*, op cit, at para 41 with regard to contextual analysis and the judgment of Langa DP in *City Council of Pretoria v Walker*, op cit, at para 26 with regard to historical analysis.

describe both features ie: it entails an attempt to address past injustices as well as systemic or other inequality wherever it impacts on people's lives. It also entails a further positive feature ie: the striving towards a vision of a society where people are able to develop their full human potential within positive social relationships.¹³ Albertyn and Kentridge¹⁴ explain that in contrast, formal equality ignores structural inequality and allows for the creation of seemingly neutral standards that may actually exacerbate existing inequalities. Feminist legal theory has contributed an important dimension to the understanding of equality by showing that equality does not aim to remove differences but rather hopes to make differences 'costless' ie. to remove the negative consequences that have been attached to these differences.¹⁵

3.1.4 Constitutional interpretation

Before trying to argue for the location of child care within the equality right it is necessary to briefly discuss the Constitutional Court's approach to Constitutional interpretation. The Constitutional Court has adopted a purposive approach to interpretation¹⁶ which 'involves articulating the values which the right seeks to uphold and identifying the interests which it seeks to protect'.¹⁷ Chaskalson P¹⁸ explains that:

The purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the bill of rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision "a narrower or specific meaning" should be given

¹³ Albertyn, C and Goldblatt, P (1998), op cit, at 249. Note that the Preamble to the Constitution states that one of the purposes of the Constitution is to 'improve the quality of life of all citizens and free the potential of each person'.

¹⁴ Albertyn, C and Kentridge, J (1994), op cit, 152-3.

¹⁵ See Littleton, C (1987) "Reconstructing Sex Equality" in *California Law Review* Volume 75, 1279.

¹⁶ In *S v Zuma and others* 1995 (4) BCLR 401 (CC) at para 15.

¹⁷ Kentridge, J and Spitz, D "Interpretation" (1996) in Chaskalson et al, op cit, at 11-32. Some of the jurisprudential issues underlying this approach are interestingly traversed in Cockrell, A (1996) "Rainbow Jurisprudence" in *SAJHR* vol 12, part 1, 1 and Klare, K.E (1998) "Legal Culture and Transformative Constitutionalism" in *SAJHR*, Volume 14, Part 1, 146.

¹⁸ In *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC), at 17.

to it.

Kentridge and Spitz explain that the existence of the limitation clause (s 36) means that interpretation of rights in the Bill of Rights occurs in two stages. First, the right itself must be considered so as to ascertain whether the act being considered falls within its scope and 'encroaches' upon it. If so, then s 36 kicks in and the court must consider whether limitation of the right is 'reasonable and justifiable'. While the first stage concerns the underlying values and purpose of the right, the second stage balances the value of the right against the 'social and political objects which may require its limitation'.¹⁹ Interestingly, as pointed out above, limitation of the equality right may only occur where such limitation is 'reasonable and justifiable' in a society based on, *inter alia*, equality. So the value of equality cannot be compromised when considering the right. The value of equality however, must itself be balanced against the values of human dignity and freedom. (The practical application of this balancing process will be considered in this chapter, below).

3.1.5 Child care and gender equality

I now briefly summarise the reasons advanced in the previous chapters for the importance of child care for the achievement of gender equality and then move on to consider the location of child care within the equality right.

The provision of child care as an aid to care-givers is a critical practical gender need²⁰ in South Africa. The overwhelming majority of primary care-givers of children are mothers and other women. Because of the poverty and disadvantage faced by most women in this country, their ability to operate in the market economy (whether in wage labour or the informal sector) is severely hampered by child care responsibilities. Unemployed women are also at a disadvantage in their ability to seek out employment or other income-producing opportunities. Even women engaged in basic subsistence activities such as collecting water and fuel have to ensure that their children are being cared for while they are so engaged. Responsibility for child care does not just

¹⁹ Ibid, at 11-34.

²⁰ See above in the introductory chapter for a discussion of strategic and practical gender needs, at 1.3.5.

involve actual physical care of children. It also involves making arrangements for others to care for children, dropping off and fetching children, ensuring that they have the appropriate food and clothing for the period that they are away, and (usually) paying for such care. Addressing these difficulties is part of the solution to the broader problem of women's poverty, subordination and the sexual division of labour in society. Achieving substantive equality in South Africa involves addressing the structural disadvantages that women, particularly poor, black women, face in our country and providing the opportunities for the realisation of their full human potential.

3.1.6 Locating child care within the equality right

The equality right is arguably²¹ one vehicle for addressing this position. The right to equality involves addressing the historical and material context in which the lack of adequate child care contributes to the disadvantages faced by women. It also involves moving towards a society where gender and other social relations have been positively transformed. Because the equality right is a complex right with a number of component parts, it is necessary to consider where in the equality right to locate the right to child care. This is both a strategic question and a conceptual question as to how to interpret the right. It also depends partly on the way in which a case reaches the court. If a case involves a challenge to a state programme which offers child care to a particular disadvantaged group, s 9(2) is likely to be used. If the court is faced with a case alleging unequal allocation of child care in different areas, it is likely to draw on the anti-discrimination sub-section. Where litigation is used to require the state to provide child care services for the advancement of gender equality, it is argued here that s 9(1) (read together with the rest of the section) is the appropriate sub-section within which to frame the right to child care as a substantive equality right.

3.1.6.1 *Section 9(1)*

S 9(1) states that everyone is equal before the law and has the right to equal protection and benefit of the law. A number of South African writers have argued that based on a purposive

²¹ The debate amongst feminists and other critical theorists about the value of rights is noted. See above in the introductory chapter at 1.4.

interpretation, the first sub-section of the equality right contains a positive and forward looking requirement of equality which goes beyond the remedial measures covered by s 9(2) and (3).²² Albertyn and Kentridge²³ have noted that the fact that the first subsection is located separately from the anti-discrimination subsection (unlike the Canadian clause) is a textual indication of the fact that they have different meanings. They see the first subsection as containing the full meaning of the requirement of substantive equality. The other subsections supplement this requirement. The Centre for Applied Legal Studies, in an *amicus curiae* submission to the Constitutional Court in the *Gay and Lesbian Coalition* case, argued that inclusion of the words 'and benefit' in s 9(1) (they did not appear in the equivalent section of the interim Constitution) is a further indication of the transformative scope of s 9(1) since it refers to the positive commitment contained in the right. The Court rejected this submission stating that the words 'and benefit' did not result in any 'change of substance in its (s 9(1)'s) objectives'.²⁴ They said that there was no need to develop a new interpretation of s 9(1) since previous judgments of the court have 'engaged in a substantive equality analysis' and remain applicable to the Final Constitution.²⁵

It is argued below (at 3.2.3) that despite the above statements of the Constitutional Court in the *Gay and Lesbian Coalition* case, the Court has given s 9(1) too limited an interpretation. It is argued here that child care needs to be seen as a substantive right located within the meaning of s 9(1) since its provision would go some way towards placing all South Africans in an equal position to participate fully in society. Obviously, the right to child care based on the right to equality will have to pass the limitations test of s 36 in any particular case. This is discussed in 3.3 below.

3.1.6.2 Section 9(3)

²² Davis, D, Cheadle, H, Haysom, N (1997) *Fundamental Rights in the Constitution: Commentary and Cases*. Kenwyn: Juta, at 54-5; Kentridge (1996), op cit, 14-16; Albertyn and Kentridge (1994), op cit, 156-7.

²³ Ibid.

²⁴ Op cit, at para 59.

²⁵ Op cit, at para 64.

The anti-discrimination section (s 9(3)) is likely to be used in a more remedial and backward looking sense in that it prevents the state from discriminating unfairly against anyone on the basis of a set of listed grounds. This could however, take two forms - a more and less extensive approach to non-discrimination. In the first case, the section would apply where child care benefits were available but were differentially allocated. In the second, more extensive case, the lack of child care could be challenged as resulting in unfair discrimination. Here, some of the more progressive Canadian and European jurisprudence dealing with pregnancy discrimination can be used and applied to child care.

Fredman²⁶ discusses the conservative approach of the United States Supreme Court in *Geduldig v. Aiello*²⁷ where the state disability insurance which provided for temporary disability or illness was held not to extend to pregnant employees. Since women and men both benefitted where there was temporary disability, pregnancy was not regarded as a ground of sex based discrimination as there was no male comparator. Women were expected to bear the costs of their pregnancy. This approach to pregnancy could not occur under our anti-discrimination clause since pregnancy is specifically listed as a ground of discrimination. Nevertheless, a similarly conservative approach might be taken towards child care unless our anti-discrimination jurisprudence is clearly defined.²⁸ The more progressive approach is to be found in the European Court case of *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum Plus)*²⁹ and the Canadian Supreme Court case of *Brooks v Canada Safeway Ltd.*³⁰ These cases held that pregnancy discrimination was direct discrimination on the basis of sex even though not all women become pregnant, since all women (unlike men) have the capacity to become pregnant. The court in *Brooks* recognised that 'since pregnancy and childbearing are fundamental social

²⁶ Fredman, S (1994) "A Difference with Distinction: Pregnancy and Parenthood Reassessed" in *Law Quarterly Review*, Volume 110, 106.

²⁷ 417 U.S. 484 (1974).

²⁸ See Kentridge, J (1994) "Measure for measure: Weighing up the costs of a feminist standard of equality at work" in C Murray (ed) *Gender and the New South African Legal Order*. Kenwyn: Juta.

²⁹ 1992 ICR 325.

³⁰ [1989] 1 S.C.R. 1219.

needs .. it was discriminatory to place the whole burden on only part of the population'.³¹ It is this argument which needs to inform the use of s 9(3) in advocating a right to child care. In arguing for a right to child care it would have to be shown that the lack of child care facilities resulted in discrimination in that this prevented women from participating or advancing in a particular situation. For example, in a company where promotion depended on regular attendance at early morning meetings, women employees with child care responsibilities would suffer discrimination. The provision of on site creche facilities could be claimed using s 9(3).

A number of the listed grounds in s 9(3) are likely to apply to child care. Sex and gender in particular, are grounds of discrimination that have shaped the unequal allocation of responsibility to women for child care. Thus, where child care is not provided or is provided unequally, this entrenches the patterns of disadvantage suffered by women. Gender discrimination would be alleged where unequal social relations between men and women have resulted in such disadvantage. Sex discrimination may be used where biological difference between men and women is used to disadvantage women. For example, where women are not provided with nursing facilities in the workplace and are not allowed to bring their infants to work. Because of South Africa's particular history, race is also a significant factor in restricting access to resources and benefits of the state, including child care facilities. Other non-listed grounds of discrimination might well be important in the context of child care. These could include geographical location, for example, where the only child care facilities provided in a municipality are all located in one particular suburb and the rest of the residents struggle to reach it.

S 9(4) extends the same prohibition on unfair discrimination to non-state bodies. This means that employers may be required to assist with child care provision should the argument apply that by not providing this assistance, women are being discriminated against.

3.1.6.3 *Section 9(2)*

This sub-section, the 'affirmative action' aspect of the equality right, has relevance to the issue of child care. Women have been disadvantaged by their position in the family and society which

³¹ Fredman, (1994), *op cit*, at 114.

requires them to take primary responsibility for the care of children. Measures designed to address this situation could include, for example, preferencing women with child care commitments for promotion in civil service jobs. There has been limited consideration of this sub-section by the courts³² and none by the Constitutional Court. It is not yet clear whether s9(2) will be used as a shield to protect affirmative action programmes or as a sword to put such programmes in place.

It has been argued that this sub-section was included 'out of excessive caution' since measures to address discrimination are permitted by section 9(1) based on a substantive equality reading of this sub-section.³³ There is some debate in the literature³⁴ and case law³⁵ as to whether the sub-section is an exception to the equality right or a means of interpreting the right as a whole. I support the latter meaning which is consistent with the notion of substantive equality and the interpretation already offered for understanding s 9(1) and (3). In addition, the first sentence of the sub-section supports a substantive equality interpretation of the right as a whole by stating that 'equality includes the full and equal enjoyment of all rights and freedoms'.³⁶ Kentridge suggests that this wording means that the sub-section is forward looking as well as backward looking.³⁷ While such an interpretation is possible, it seems most appropriate to frame the right to child care within s 9(1) for the reasons given above.³⁸ S 9(2) may well be used where a programme designed to assist disadvantaged parents by providing child care, comes under threat. But the inclusion of the word 'may' in the sub-section suggests that it would be difficult to use the sub-section to require the state or some other body to provide child care as a right. The sub-

³² *Public Servants Association of SA v Minister of Justice*, op cit; *Motala and Another v University of Natal* 1995 (3) BCLR 374 (D).

³³ Davis, D et al (1997), op cit, 59; Albertyn, C and Kentridge, J (1994), op cit, 173.

³⁴ Albertyn, C and Kentridge, J (1994), ibid; Kentridge, J (1996), op cit, 14-35-7; Smith, N (1995) "Affirmative Action under the New Constitution" in *South African Journal of Human Rights*, Volume 11, Part 1, 84.

³⁵ *Public Servants Association of SA v Minister of Justice* 1997 (3) SA 925 (T), at 977 I - 978 D.

³⁶ In the *National Coalition for Gay and Lesbian Equality* case (op cit, at para 62), Ackermann J says that this phrase is an unequivocal assertion of substantive equality.

³⁷ (1996), op cit, 14-39.

³⁸ At 3.1.6.1

section does look forward to a situation where all people will be able to enjoy the rights and freedoms offered in the Constitution, but it does not appear to offer the mechanisms for the realisation of this goal in as effective a manner as does s 9(1).

The proper use of this sub-section is intimately tied to the meaning of 'unfair discrimination' in s 9(3), (4) and (5). This meaning will be discussed further when examining the Constitutional Court's approach to the equality right in recent cases. I now look at this emerging jurisprudence so as to consider whether the Court is likely to respond favourably to the arguments made above for locating the right to child care within the equality right, and in particular, within s 9(1).

3.2 CHILD CARE AND THE CONSTITUTIONAL COURT'S APPROACH TO THE EQUALITY RIGHT

3.2.1 The development of the equality test

The Constitutional Court, during the short period of its operation, has had the opportunity to consider the right to equality in a number of key cases. Most of these cases have concerned s 8 of the Interim Constitution but the recent case of *National Coalition for Gay and Lesbian Equality* has stated that the court's equality jurisprudence is equally applicable to s 9 of the Final Constitution.³⁹ Initially, the court made general conceptual statements about the right but over the course of a number of cases, it began to formulate a test to be used when considering the meaning of equality before the law (s 9(1)) and non-discrimination (s 9(3)). It has not yet had the opportunity to consider the 'special measures' sub-section (s 9(2)) or the sub-section dealing with discrimination by non-state bodies (s 9(4)). Recent cases have seen the court beginning to apply its own equality test⁴⁰ and consider some of the more specific features of s 9(3) such as

³⁹ Op cit, at para 15.

⁴⁰ *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council and Others* 1998 (1) BCLR 1 (CC).

direct and indirect discrimination⁴¹ and unlisted grounds⁴².

The early case of *Brink v Kitshoff NO*⁴³ set out the court's understanding of discrimination. O'Regan J stressed that South Africa's Apartheid history and its legacy was important in understanding our equality clause. She noted that while race discrimination was the most 'visible and vicious pattern of discrimination' other systemic forms of discrimination such as sex and gender discrimination were also 'inscribed on our social fabric'.⁴⁴ The judgment is important in recognising that inequality affects individuals within groups in a society with preexisting, harmful social divisions.

In *The President of the Republic of South Africa and Another v Hugo*⁴⁵ various judges made further statements about the meaning of unfair discrimination which start to point to jurisprudential differences within the court. The majority judgment of Goldstone J stated that⁴⁶:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.

Goldstone J went on to cite,⁴⁷ with approval, the judgment of Madame Justice L'Heureux-Dubé in *Egan v Canada*⁴⁸ which said:

This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society: *Big M Drug Mart Ltd* [(1985) 13 CRR 64] at p.97 ...

⁴¹ *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC).

⁴² *Larbi-Odam and others v Member of the Executive Council for Education (North-West Province) and another* 1997 (12) BCLR 1655 (CC).

⁴³ 1996 (6) BCLR 752 (CC).

⁴⁴ At paras 40-44.

⁴⁵ 1997 (6) BCLR 708 (CC).

⁴⁶ At para 41.

⁴⁷ *ibid.*

⁴⁸ (1995) 29 CRR (2d) 79, at 104-5

(per Dickson J. (as he then was)). More than any other right in the *Charter*, s. 15 gives effect to this notion. . . . Equality, as that concept is enshrined as a fundamental human right within s. 15 of the *Charter* means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.

Goldstone J, in *Hugo*, placed the emphasis on the dignity of the individual rather than on the systemic discrimination of groups (the focus in *Brink*).⁴⁹ A different emphasis was given by O'Regan J (in her concurring judgment) in the *Hugo* case where she focused on group vulnerability and the invasion of interests.⁵⁰ While this underlying jurisprudential debate may still be aired in future decisions, at present the 'dignity-centred' approach taken by Goldstone J has dominated the court's formulation of its equality test.

The equality test began to be developed in *Prinsloo v Van der Linde and Another*⁵¹ which considered the relationship between the equality before the law and unfair discrimination sub-sections of the equality right. Here, the court distinguished between 'mere differentiation' where there is no rational relationship between the differentiation and a legitimate government purpose, and differentiation that infringes the first sub-section of the right.⁵² Having considered this distinction a court is required to enquire as to whether this differentiation constitutes unfair discrimination. The *Hugo* case developed the mechanisms for determining whether discrimination was unfair. The court said that the impact of the discrimination on individuals and groups must be examined contextually. This accords with the court's acceptance of substantive equality as the proper interpretation of the equality clause. The court said, in addition, that:

To determine whether that impact was unfair it is necessary to look not only at the group

⁴⁹ See Albertyn, C and Goldblatt, B (1998), op cit.

⁵⁰ At paras 112-5.

⁵¹ 1997 (6) BCLR 759 (CC).

⁵² At paras 26-28.

who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.⁵³

This broad approach was crystallised into a step-by-step equality test in the case of *Harksen v Lane NO and Others*.⁵⁴ The test reads as follows:⁵⁵

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1)(section 9 (1) of the Final Constitution). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2) (section 9 (3) of the Final Constitution).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)(section 36 of the Final Constitution).

The test requires a court to first consider whether an impugned act passes the minimum

⁵³ At paras 42-3.

⁵⁴ 1997 (11) BCLR 1489 (CC).

⁵⁵ At para 53. The underlined words are my addition.

requirements of s 9 (1) which acts as a 'gatekeeper' before the unfair discrimination enquiry can begin.⁵⁶ The court has however stated (in the *National Coalition for Gay and Lesbian Equality* case) that the rational connection enquiry of the first stage (a) is 'unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable'.⁵⁷ In other words, it merely has to be shown that there is a differentiation, before moving to the second stage (b). The unfair discrimination enquiry then follows. (As has been noted above, this enquiry has been significantly coloured by the courts emphasis on impairment of dignity as the basis for a finding of unfair discrimination). Thereafter, the court must proceed to the limitations enquiry.

3.2.2 Application of the equality test to the argument for child care as an equality right

The chapter has set out the Constitutional Court's approach to the equality right. This approach is now applied to the issue of child care in an attempt to assess how the court might treat such an issue. As has been discussed in the section above, the court has only really developed a test to deal with claims of discrimination (the *Harksen* test). This test will be applied to an imaginary set of facts. Thereafter, s 9(1) of the equality right will be applied to another example to argue that this sub-section is the most appropriate to base a claim for child care as a positive right.

3.2.2.1 *The Harksen test applied to child care*

Assume that a municipal council decided to close down all municipally funded creches in its area based on the argument that the funds were needed to be used towards the setting up of a municipal police force. Users of the creche, mainly mothers, challenged this decision claiming that it discriminated against them on the basis of gender. They argued that because of the unequal responsibilities between men and women regarding child care, the financial, physical and emotional burden of caring for the children previously placed in the creches, would fall on them.

⁵⁶ See below at paragraph 3.2.3. For further on the court's interpretation of s 8 (1) of the Interim Constitution (s 9 (1) of the Final Constitution) see Albertyn, C and Goldblatt, B (1998) "The Decriminalisation of Gay Sexual Offences: *The National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others*, Unreported Case No: 97/023677, WLD" in *South African Journal of Human Rights*, Volume 14, Part 3, 461.

⁵⁷ At para 18.

It would affect their ability to retain their employment, seek employment and manage their other family responsibilities.

Following the *Harksen* test, the court would first look at whether the act of closing down the facilities differentiated between men and women in the community. Then it would consider whether the closing down of the creches was rationally connected to a legitimate government purpose. Even if the court found that it did, it would still have to consider whether the differentiation amounted to unfair discrimination. Since gender is a listed ground, in this case discrimination would be found to be present and unfairness would be presumed. The municipal council would have to show that their act was not unfair based on the impact of the act on the women concerned. Here the court would consider Goldstone J's three criteria: the group that has been disadvantaged, the nature of the power used and the interests affected. It is likely that the court would find that there had been unfair discrimination. Following the *National Coalition for Gay and Lesbian Equality* judgment which spoke of substantive, remedial and restitutionary equality, the court would probably consider the historic disadvantages faced by mothers in society, especially poor, mainly black, mothers. The court would then have to conduct a limitations enquiry (in terms of s 36) to determine whether the redirecting of resources towards municipal policing was reasonable and justifiable.⁵⁸ Here, the issue of community priorities would have to be considered.

The above example indicates that maintaining existing benefits to child care might well be possible based on the court's equality test. What is less clear is whether benefits will be ordered where none exist.⁵⁹ Take the following example: a group representing women claimants of the Unemployment Insurance Fund (UIF) bring a challenge against the Department of Labour on the basis that their members need child care facilities at the offices of the UIF if they are to be in a position to fill out forms, wait in queues and undertake other tasks necessary for use of the UIF system, which is hampered by having to care for children at the same time. Here, the group could argue that the lack of facilities constitutes discrimination on the basis of gender since women,

⁵⁸ See 3.3 below for a discussion of the relationship between the equality right and the limitations enquiry.

⁵⁹ See 3.1.6.2 above for the discussion of the more ss extensive ways in which the anti-discrimination section could be used.

who are primarily responsible for child care in society, are less able to benefit from the UIF system than male claimants who are (largely) unencumbered. In this case, the court may accept that unfair discrimination operates but it is unclear whether they would order the Department of Labour to provide child care facilities because of the resource implications of such an order.⁶⁰ It seems more appropriate and more likely to be successful to frame this claim in terms of s 9(1).

3.2.2.2 *S 9(1) applied to child care*

The argument for locating the right to child care within s 9(1) of the equality right is based on a vision of a new society which recognises that a society that provides child care for all who need it is a society that acknowledges that men and women are equally entitled to develop and fulfill their potential. It does not assume that women will take on the major burden of child care and sees the provision of child care as one mechanism to transform gender relations. S 9(1) offers the vehicle for the achievement of this vision and is preferable to s 9(2) or (3) which largely deal with righting past wrongs. S 9(1) says that not only is everyone equal before the law but offers everyone equal protection and benefit of the law. It offers care givers of children (mainly women) the promise that the law will be used to create a situation where responsibility for child care does not determine one's life chances. In the above example of the UIF claimants, the issue is not about discrimination (or not only about discrimination) but is rather about creating the conditions in society for all people to participate and benefit equally. An additional situation where s 9(1) may be appropriate is where for example, women users of the maintenance courts claim that the lack of child care facilities prevents them from conducting their cases on an equal footing to the men from whom they are claiming maintenance. Here, they are not 'equal before the law' and need assistance (in the form of child care facilities) to be put in an equal position.⁶¹

⁶⁰

See 3.3. below for a discussion of the enforceability of positive rights.

⁶¹

This argument finds support in the case of *Qozeleni v Minister of Law and Order & Another* 1994 (3) SA 625 (F). In this case Froneman J held that s 8(1) required that a fair trial entailed an 'equality of arms' such that each party must be in the same position to participate. Froneman J noted (at 642 F-G) that the application of this principle does not only apply to litigation "but would also extend to non-judicial remedies aimed at the exercise or protection of ... rights". In the recent (as yet unreported) Cape case of *Cary v Cary*, case number 14159/98, Donen AJ said that Rule 43 of the Uniform Rules of Court should be used to ensure an 'equality of arms' in divorce matters based on s 9(1) of the Constitution.

The Constitutional Court has given limited meaning to the 'equal protection and benefit of the law' sub-section of the equality right. In *Prinsloo* the court noted the positive nature of the right in s 8(1) and the negative formulation of the right in the anti-discrimination sub-section.⁶² The court then briefly discussed the 'equality before the law' clause of the first sub-section of the right and gave it a relatively minimalist procedural interpretation.⁶³ The judgment then moved into a discussion of differentiation and its relationship to unfair discrimination.⁶⁴ Thus, 'equal protection of the law' was not considered in its positive sense at all in the case. Rather than developing s 8(1) as the central vehicle within the equality right for the achievement of substantive equality, the court treated it as a means of weeding out challenges which could not be considered as equality violations. The *East Zulu Motors* case took a similar approach to the equality right. O'Regan J said that 'in each equality challenge the first question is whether the challenged provision or conduct differentiates between different categories of people... The first question to be answered in any equality challenge, therefore, is whether the governmental action or regulation under consideration is rational'.⁶⁵ As was noted above,⁶⁶ the *National Coalition for Gay and Lesbian Equality* case has reduced the role of s 9(1) even further by removing the 'rational connection' aspect of the test for unfair discrimination in certain cases.

The development of substantive equality has been located largely within the unfair discrimination sub-section. This raises problems since it equates substantive equality with non-discrimination yet the concept of substantive equality contains a wider and more positive meaning - a vision for a society based on equality. Ackermann J, in the *National Coalition for Gay and Lesbian Equality* case, alluded to this wider meaning but did not develop it when he linked substantive equality to s 9(2) which talks of the 'full and equal enjoyment of all rights and freedoms'.⁶⁷ He said however, that there was 'no need to fashion a new interpretation of s 9(1)' and that the court

⁶² At para 22.

⁶³ Ibid.

⁶⁴ At para 23.

⁶⁵ At paras 23-4.

⁶⁶ At 3.2.1.

⁶⁷ At para 62.

had approached the entire right within a substantive equality framework.⁶⁸ While this judgment does make important statements regarding substantive equality (as mentioned above), it fails to expand the meaning or use of s 9(1) towards the achievement of substantive equality. The judgment was primarily concerned with a discrimination enquiry and should therefore not be understood to foreclose further development of the interpretation of s 9(1) or the equality right as a whole.

There may be some reluctance on the part of the court to require the state or a private body to provide child care as a right since this entails a truly substantive approach to equality. Even leaving aside the limitations enquiry which would introduce factors such as cost and government priorities, requiring the court to frame child care as a right would be to require it to go considerably further than it has in any equality case thus far. The court has, however, made a number of important statements on the position of women and the sexual division of labour in certain key cases. These cases, which will now be discussed, do indicate an awareness in the court that equality means much more than 'same treatment' and requires remedial measures and social change in areas not traditionally considered by courts. Much may depend on the way in which the issue of child care reaches the court and the way such cases are argued.

3.2.3 The Constitutional Court's approach to gender and child care

The Constitutional Court has considered four cases dealing with sex, gender and marital status. It is interesting to note that two of these were brought by wealthy white women (*Brink and Harksen*) while the other two were brought by white men (*Fraser v Children's Court, Pretoria North and Others*⁶⁹ and *Hugo*). This indicates that access to the court is impaired by reason of poverty, race and gender and means that the emerging jurisprudence will of necessity be shaped by the experiences of only certain privileged groups. It also raises questions about how a claim to child care as a right will reach the court, who will bring it and what the nature of the arguments

⁶⁸ At para 64.

⁶⁹ (1997) 2 BCLR 153 (CC).

will be.⁷⁰

The court has made a number of important statements about the position of women in society and the unequal burden of child care on women. These statements are significant and provide some indication that the court may be willing to accept a 'child care as equality right' argument. Nevertheless, it must be recognised that while the court has made these seemingly progressive statements, it does not follow that the court will necessarily always use its jurisprudence to advance substantive equality.⁷¹

These are some of the statements emerging from the cases:

Fraser

In *Fraser* the court had to consider a challenge by an unwed father to a section of the Child Care Act 74 of 1983 preventing him from consenting to the adoption of his child who was born out of wedlock. The court found that his equality rights had been violated since the impugned section discriminated unfairly between fathers in certain unions (such as Muslim unions) and other unions (Customary unions) but due to the complexities of the changes required to be made to the section, referred the matter to be remedied by the legislature. The fact that the applicant did not claim to be in any type of religious or other union was not dealt with by Mahomed DP who seemed to derive much of his argument from his own sense of outrage as a Muslim. He did not accept that there was gender or marital status discrimination in any blanket sense given the complexities of the adoption situation.

The judgment is an interesting mix of essentialist assumptions about the gendered nature of parenting and some positive recognition of the context in which women are burdened by

⁷⁰ See below at 3.4 for a discussion of some of these complexities in the Canadian context in light of the *Symes* case.

⁷¹ See for example the case of *Harksen*, discussed below at p 77, where the majority and minority judgments took very different approaches.

parenting responsibilities. Mahomed DP said:⁷²

The mother of a child has a biological relationship with the child whom she nurtures during the pregnancy and often breast-feeds after birth. She gives succour and support to the new life which is very direct and not comparable to that of a father.

This statement carries a danger that can lead to essentialist thinking about the immutability of the position of men and women with regard to child rearing. Later in the judgment however, Mahomed DP seemed very alive to the contextual issues which impact on women's position in society and the structural disadvantages that result. He said:⁷³

The question of parental rights in relation to adoption bears directly on the question of gender equality. In considering appropriate legislative alternatives, parliament should be acutely sensitive to the deep disadvantage experienced by the single mothers in our society. Any legislative initiative should not exacerbate that disadvantage. In seeking to avoid doing so, it may well be that the legislative approaches adopted in "first-world" countries described in the preceding paragraphs should be viewed with caution. The socio-economic and historical factors which give rise to gender inequality in South Africa are not always the same as those in many of the "first-world" countries described. The task facing parliament is thus a challenging one.

Brink

In *Brink*, as already noted, the court made important statements about the disadvantages faced by women in South Africa. In this case, the Applicant challenged a section of the Insurance Act 27 of 1943 which prevented wives from receiving benefits of policies ceded by their husbands who were subsequently sequestered. The court found the provision to be invalid as it constituted unfair discrimination on the grounds of sex and marital status and there was no basis for limiting the equality right in this case. O'Regan J made important statements about the overlapping nature of race and gender discrimination. She said:⁷⁴

Although in our society discrimination on grounds of sex has not been as visible, nor as

⁷² At para 25.

⁷³ At para 44.

⁷⁴ At para 44.

widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap.

Harksen

The *Harksen* case provides an interesting contrast to *Brink* since the majority held that a provision of the Insolvency Act 24 of 1936 which results in the vesting of the separate estate of a spouse of an insolvent, was not invalid. Goldstone J, in the majority judgment, noted that ‘ the position of women in our society has changed radically... More and more women have become economically active and contribute out of their own income or investments to the property of a common household’.⁷⁵ Goldstone J used this statement to justify his finding in favour of creditors rather than spouses. He assumed that women were no longer at an economic disadvantage within the family. O’Regan J, in her dissenting judgment, adopted a more contextual and historical approach in examining marital status discrimination in South Africa. Her judgment gives judicial recognition to the sexual division of labour and the unequal child care burden carried by women in our society. O’Regan J noted that cohabitees, people in religious and customary unions were denied the benefits of marriage. She also noted that married women were discriminated against by law. These laws were based on:⁷⁶

... an assumption that women were primarily responsible for the maintenance of a household, the rearing of children, while men’s responsibilities lay outside of the household. These rules reflected and entrenched deep inequalities between men and women. Not infrequently women’s experience of marriage therefor was (and sometimes still is) one of subordination, both in relation to the rules regulating matrimonial property (whether customary or common law) and in relation to the division of labour within the household...

Hugo

⁷⁵ At para 57.

⁷⁶ At para 94.

The case of *Hugo* offers the most important statements on gender and child care provided thus far by the Constitutional Court. The Applicant, a father, challenged a Presidential grant of special remission to all prisoners who were mothers of children under the age of twelve (and who had committed certain less serious offences) for discriminating against him on the basis of gender. The majority judgment of Goldstone J held that the impugned act did not constitute unfair discrimination. On the position of women with regard to child care, Goldstone J said:⁷⁷

I see no reason to doubt the assertion that mothers, as a matter of fact, bear more responsibilities for child-rearing in our society than do fathers. This statement, of course, is a generalisation. There will, doubtless, be particular instances where fathers bear more responsibilities than mothers for the care of children. In addition, there will also be many cases where a natural mother is not the primary care giver, but some other woman fulfills that role, whether she be the grandmother, stepmother, sister, or aunt of the child concerned. However, although it may generally be true that mothers bear an unequal share of the burden of child rearing in our society as compared to the burden borne by fathers, it cannot be said that it will ordinarily be fair to discriminate between women and men on that basis.

For all that it is a privilege and the source of enormous human satisfaction and pleasure, there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment...That parenting may have emotional and personal rewards for women should not blind us to the tremendous burden it imposes at the same time. It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared.

⁷⁷

At paras 37-8.

This statement denotes important judicial recognition of women's unequal position in society with regard to child care and draws linkages between equality and child care. It stresses the need for men to take greater responsibility if we are to achieve equality.

The issue of state or private sector provision of child care is yet to be considered by the court. The above statements point however, to a willingness on the part of the Constitutional Court to take judicial notice of gender inequalities and the relationship between these inequalities and child care in our society.

3.3 LIMITATIONS AND ENFORCEABILITY OF CHILD CARE AS AN EQUALITY RIGHT

It has been argued above that child care is a right entailed within the right to equality. Assuming that the court accepts this argument, the state or private body being required to provide such child care has an opportunity to argue that the right needs to be limited on the basis of the limitations clause (s 36). Issues such as the high cost of child care and the ability of the state or private body to make resources available are likely to be the major considerations here. Also, the state or private body may argue that while resources are available for certain services for those in need, such resources are more necessary for services other than child care, such as medical services. This raises the thorny issue of enforceability of positive rights - many legal writers and practitioners (including many judges) are reluctant to see our Constitution as offering anything more than a 'shield' against state interference in individual rights.⁷⁸ In this section I will first discuss the issue of equality as a positive right. I will then set out the relationship between the limitations clause and the equality right. Finally, I will look at the way in which child care, brought under s 9(1), should be treated when engaging in a limitations enquiry.

3.3.1 Positive rights

Since the Constitutional Court has not yet provided a clear, positive interpretation to s 9(1), it has

⁷⁸ See De Vos, P (1997) "Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution" in *South African Journal of Human Rights*, Volume 13, Part 1, 67, at 69.

not considered the notion of equality as a positive right.

The Constitutional Court has made specific reference to its positive obligations under the Bill of Rights. In *Soobramoney v Minister of Health, KwaZulu-Natal*⁷⁹ Chaskalson P stated that the Bill of Rights 'deals specifically... with certain positive obligations imposed on the State'. The court has accepted that 'the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters' and that they are nonetheless justiciable. The court has further accepted that civil and political rights 'such as equality, freedom of speech and the right to a fair trial' also have budgetary implications.⁸⁰

S 7(2) of the Constitution says that 'the state must respect, protect, promote and fulfill the rights in the Bill of Rights'. De Vos argues that this was a deliberate formulation, consistent with international views that all rights (civil, political, social and economic) contain four different types of obligations (ie: the duty to respect, protect, promote and fulfill the rights).⁸¹ The obligation to promote rights 'could include a duty on the state to directly provide basic resources to fulfil an individual's basic needs when no other possibilities exist for individuals to realise their rights.'⁸²

Unlike some of the social and economic rights in the Bill of Rights, the right to equality does not contain qualifications (such as s 26(2) of the right to housing which says 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right' and talks about a right of 'access'.) The equality right should therefor be understood as a strong positive right based on Kriel's⁸³ argument that there are two kinds of positive rights - strong and weak. Strong positive rights 'can be asserted regardless of

⁷⁹ See *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC), at para 15.

⁸⁰ *In re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC) at paras 77-8.

⁸¹ (1997), op cit, at 78-9.

⁸² De Vos, P (1997), op cit, 86.

⁸³ Kriel, R (1996) "Education" in Chaskalson, M, Kentridge J, Klaaren, J, Marcus, G, Spitz, D and Woolman, S (1996) *Constitutional Law of South Africa*. Kenwyn: Juta, 38-1-2.

the state's other budgetary imperatives' although the state is still entitled to argue that the right should be limited. Weak positive rights are those that are qualified such as some of the social and economic rights discussed above.

3.3.2 The relationship between s 9 and s 36

Kentridge suggests that equality contains two rationales. The first is based on fairness (concerning issues of morality, right and legitimacy) while the second is based on rationality (involving issues of utility and efficiency).⁸⁴ Ideally, both rationales should co-exist in justifying a particular act as constituting equality. This dual focus emerges in the way in which the equality right and the limitation's clause are considered in each case. As explained above,⁸⁵ the process of Constitutional interpretation requires a two-stage enquiry where initially it must be shown that an act encroaches on a right and then consideration must be given to whether such encroachment is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.⁸⁶

It has been pointed out that in relation to the equality right this appears to be a paradoxical process since it seems unlikely that a violation of equality can be justified in a society based, *inter alia*, on equality.⁸⁷ Kentridge⁸⁸ explains that the two stages of justification contain quite different enquiries. The first stage considers whether s 9 has been violated based on considerations of 'political morality underpinning the right ... itself'. The second stage considers whether such violation is 'permissible because it serves a legitimate social purpose in a way which is proportionate to the end which ... (it) seek(s) to achieve'. The limitations enquiry concerns 'balancing the right to equality against other rights and against other aspects of public policy,

⁸⁴ (1994), *op cit*, at 84.

⁸⁵ At paragraph 3.1.4.

⁸⁶ S 36.

⁸⁷ Kentridge, J (1996), *op cit*, 14-42-3.

⁸⁸ *Ibid*.

such as the distribution of limited resources'.⁸⁹ The court has struggled with its application of this distinction in practice. In *Hugo*, Kriegler J, in a dissenting judgment, correctly noted that the majority 'applies a s 33 (1) analysis at the point of looking for a rebuttal of unfairness'.⁹⁰ Kentridge's approach is followed as it appears to distinguish correctly between the two enquiries involved in determining whether to limit a right to equality.

3.5.5 Child care, s 9(1) and the limitations enquiry

It has already been noted that the Constitutional Court in *Prinsloo* has, at least rhetorically, defined s 8(1) of the equality right (s 9(1) of the Final Constitution) as containing a positive right.⁹¹ It has been argued above that equality is a strong positive right since it contains no qualifications. The right to equality (and in particular s9(1)) must be understood as being capable of requiring the state to make resources available for the promotion of the right.

It has been argued in this chapter that the right to equality requires the provision of child care if the social and economic position of women in society is to be altered. This argument is based on the moral and political justification underpinning the right to equality. Once a party has established this right, the state or a private body can raise arguments under the limitations clause that their failure to provide this service is permissible on the basis of public policy. The onus is on the state or private body to produce evidence to show that the provision of child care is not a policy or resource priority.⁹²

Take the example (referred to above)⁹³ regarding women UIF claimants requiring creche

⁸⁹ Ibid. Stuart Woolman (1997) in "Out of order? Out of Balance? The Limitation Clause of the Final Constitution" in *South African Journal of Human Rights*, Volume 13, Part 1, 102, questions whether 'balancing' is the correct reasoning process when considering limitations of rights.

⁹⁰ At para 78. For further discussion of the relationship between s 9 and s 36 see Albertyn, C and Goldblatt, B (1998), *op cit*, at 269-272.

⁹¹ At footnote 61 above.

⁹² See *Van Biljon and Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (C) where Brand J (at 455 C-F) held that lack of funds is an insufficient answer to a constitutional claim and that the state must show why it cannot afford such a claim.

⁹³ At 3.2.3.

facilities. Here, the claimants would have to provide evidence at the first stage of the enquiry, of the context in which unemployed women find themselves. This would involve an examination of the position of women in South Africa and the unequal responsibility they bear with regard to child care. It would also include evidence of poverty and high levels of unemployment affecting black women in particular. There would have to be evidence of the lack of child care facilities in South Africa (available to only 6% of African children). It would have to be explained that it is difficult, if not impossible, to pay for and physically transport a number of children of different ages to a UIF office in an inaccessible location. Having done so, the woman claimant would have to wait in long queues, fill in forms and make enquiries while simultaneously attending to the needs of the children (including feeding them, changing their nappies, accompanying them to the toilet, comforting them, entertaining them, etc). This evidence would support the argument that unless facilities were available at the UIF offices which addressed the needs of the children accompanying claimants, their mothers' equality rights would be violated.

Having established such a right, the court would consider the limitations arguments advanced by the government. These would probably include the statement that the limited funds available to the UIF should be used to pay claimants rather than fund child care facilities. In such a case the court would have to require the Department to prove that it was unable to redirect other funds towards this purpose or even that it was unable to ask the Finance Department for further resources. The Department would have to justify why the provision of child care facilities was not a priority as compared to other government priorities and the court would scrutinise this justification.

The outcome of such a case would obviously depend on the evidence presented, the way in which it was argued and the court's approach to the balancing of priorities. It is hoped that the court will give effect to some of its progressive statements about the position of women in cases such as these and not accept bald statements by government that provision of child care is financially impossible.

3.4 THE EXAMPLE OF THE *SYMES* CASE: SOME OF THE COMPLEXITIES OF A

CHILD CARE/EQUALITY ARGUMENT

In this chapter, it has been argued that the right to child care can and should be framed as an equality right. More specifically, it has been argued that it should be brought under s 9(1) as a positive right necessary for the achievement of gender equality in our country. The issue may be litigated in this manner, but it also may reach the court in a number of other ways. The Canadian Supreme Court had the opportunity of considering child care and equality in the case of *Symes v Canada*.⁹⁴ The judgments and commentaries on the case highlight a number of interesting issues which arose because of the particular litigant and the way in which the case was formulated. We can learn a great deal from this case for our own jurisprudence. Thus, the facts and judgments in the case will be briefly described, then some of the comments on it will be outlined, and finally, some of the lessons for South Africa will be considered.

3.4.1 *Symes*: the facts and judgments

3.4.1.1 *The facts*

Symes was a full-time partner in a law firm and married with two children. She employed a nanny to care for her children. In her income tax returns for 1982 to 1985, Symes deducted the wages paid to the nanny as business expenses. In 1983 and 1984, in notices of assessment, the revenue authorities allowed these deductions. However, on reassessment in 1985 and 1986, the deductions were disallowed for all four years. The expenses were described as personal or living expenses and not business expenses. The revenue authorities allowed Symes to make certain lesser child care deductions based on s 63 of Canada's Income Tax Act which allowed deductions for expenses generated to enable a person to be employed or engage in business, based on a specific formula. Symes successfully challenged the reassessment in the federal trial court but lost at the appeal court. The case then went to Canada's highest court, the Supreme Court, for consideration. The court had to consider, in terms of statutory interpretation, whether s 9 of the Income Tax Act dealing with business expense permitted the deduction of child care expenses. If not, it had to decide whether this was a violation of s 15 of the *Charter* (the equality

right in the Canadian Bill of Rights). If it was, it had to consider whether it was nevertheless justified under s 1 of the *Charter* (the Canadian limitations clause).

3.4.1.2 *The majority judgment*

Iacobucci J delivered the majority judgment which upheld the decision of the appeal court allowing the reassessments to stand and requiring Symes to pay the outstanding tax. He acknowledged that child care expenses were difficult to classify as either business or personal expenses but said that he did not need to determine the meaning of s 9 because of the provision in s 63 which made it clear that child care expenses were meant to be covered comprehensively by s 63. The section clearly applied to business people as well as employees. Iacobucci J then looked at the right to equality and said that Symes had failed to show that women bore the major financial costs of child care even though he agreed that they bore the major social costs. Therefore, there was no proof of an adverse effect of the provision on women (although single mothers may have been able to prove sex discrimination in another case). The other problem that the court raised with Symes' case was that she was arguing for a benefit to be increased to an advantaged group of self-employed women through 'uncapping' the benefit in s 63. This was argued without looking at the more disadvantageous position of employed women, including those who earned too little to benefit at all from the deduction and how increasing the position of the better-off would affect the child care system as a whole.

3.4.1.3 *The dissenting judgment*

L'Heureux-Dube J, as she often does in Supreme Court cases, delivered the dissenting judgment in which she wrote that Symes was entitled to deduct her full child care expenses as business expenses. She found that business expenses should include child care expenses which she found were not personal in nature. She supported this by showing that club dues, entertainment expenses and various other expenses were previously allowed on the basis of 'the needs of business men'. L'Heureux-Dube J pointed out that:⁹⁵

While there is a personal component to child raising, and while the care of children may

⁹⁵

At page 73.

be personally rewarding, this 'choice' is a choice unlike any others. This 'choice' is one from which all of society benefits, yet much of the burden remains on the shoulders of women. Women 'choose' to participate in an activity which is not for their benefit alone, and in so doing, they undertake a function on behalf of all society.

The judge found that s 63, designed to assist working parents, could not be interpreted as precluding business women from claiming additional child care expenses as business expenses. She said that the tax system did distinguish between employed and business people. Some of these 'vertical inequities' were problematic, others not. But the real issue was 'the question of horizontal equity and the need to treat all business persons alike'. She concluded that.⁹⁶

'To disallow child care as a business expense clearly has a differential impact on women and we cannot simply pay lip service to equality and leave intact an interpretation which privileges business men, and which continues to deny the business needs of business women with children'.

L'Heureux-Dube J also made an important contextual point that not all self-employed people are wealthy and that many self-employed women work in small business for long hours and thus have a critical need for child care. Moving away from statutory interpretation to a consideration of the right to equality, L'Heureux-Dube J stressed that the *Charter* guarantees 'true substantive equality between men and women' - a central concern to this case. She disagreed with the majority that proof that women take social responsibility for child care does not amount to proof that they actually pay for child care. She said that such an inference was 'inescapable'. Since it was proved that Symes did in fact pay for these expenses, she would suffer discrimination if denied the right to deduct these simply because such expenses are not 'generally incurred by businessmen'. The judge recognised the problems with the child care system and the inequalities in the tax system but said that Symes had raised a narrower issue about discrimination of business women. She said that 'discrimination cannot be justified by pointing to other discrimination' and that the case was about differences between men and women not between women and less advantaged women. She quoted an academic commentary on the appeal judgment which said that the judge preferred to see 'all women equally disadvantaged relative to men if the alternative is to improve the situation of the best-off women'.

3.4.2 Comments on the *Symes* case and lessons for South Africa

The *Symes* case generated 'ambiguity' amongst Canadian feminists since it seemed to raise issues of sex equality and yet the plaintiff represented only a small and privileged section of women. Some writers saw the case as highlighting the problems with anti-discrimination law which requires claimants to caricature themselves to fit into preexisting categories rather than define themselves as complex social beings. Nitya Iyer⁹⁷, discussing the *Symes* case while the Supreme Court judgment was still pending, said that the appeal court judge saw Symes as too privileged to fit into the disadvantaged group of 'women'. But the trial court view that she suffered sex discrimination also raised problems. Here, Symes came to represent all women despite the differences amongst the category of 'women', most notably class. By assisting Symes, more disadvantaged women who could not claim the additional expenses, would pay proportionally more tax. Iyer said that if taxes were increased 'to compensate for the loss of revenue flowing from the decision in favour of Symes, women employees (and others) will be worse off in an absolute sense'.⁹⁸

A similar argument was made by Claire Young⁹⁹ where she pointed to the problems with the tax system itself which 'privileges wealth'. In addition to the inequalities that a finding in favour of Symes would have generated for employed women, a further problem would have resulted. In heterosexual relationships where one party was self-employed it would probably be a man (men make up 75% of the self-employed) who would take advantage of the deduction. This would go against the underlying policy behind the s 63 deduction which was 'to reduce the disincentive for women to participate in the paid labour force'.

There are writers who argued that the deduction should have been extended to Symes as its'

⁹⁷ Iyer, N (1993) "Categorical Denials: Equality Rights and the Shaping of Social Identity" in *Queen's Law Journal* Volume 19, 179.

⁹⁸ Ibid, at 201, footnote 60.

⁹⁹ Young, C (1994) "Child Care - A Taxing Issue?" in *McGill Law Journal*, Volume 39, 539, at 556-7.

denial constituted sex discrimination. Eansor and Wydrzynski,¹⁰⁰ also writing before the Supreme Court decision in *Symes*, argued for a more contextual approach to statutory interpretation. Like L'Heureux-Dube J, they saw it as important to improve the position of self-employed women, even if this did not solve the problems faced by the majority of women in the employment market.

The writers who have considered the case raise important points for our own equality jurisprudence. They stress the issue of contextual analysis, thus requiring courts to consider evidence about the position of the affected groups. At the same time, they warn that anti-discrimination law must be able to accommodate intersections between groups so that groups do not 'fall through the cracks'. They also highlight the limits of law and constitutionalism as a vehicle to improve the lives of women, particularly where social services are poorly designed. Finally, they indicate the dangers of litigation on an issue such as child care where the nature of the litigant and the legal argument are less than ideal in tackling the real issues facing the most disadvantaged women.

In South Africa, child care is more likely to reach our courts in a *Symes* type case than through more substantive litigation because it is mainly people who have resources that are able to go to court in our country. This poses a challenge to feminist activists to link child care to equality in strategic and carefully planned litigation. Those who wish to challenge the law regarding child care will have to decide whether to use the courts to improve the situation or look to Parliament for changes instead. The benefit of going to court is that litigation forces the issue whereas legislative change depends on the willingness of politicians to make such changes. The legislative process is also often slow and parties may choose the courts if they wish to effect change on an urgent basis. Litigation may result in the court developing a rights framework for the issue of child care. This would be of great value in framing government policy on child care.

The problem with litigation on the issue of child care is that the courts have taken a relatively

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Eansor, D. and Wydrzynski, C. (1992) "'Troubled Waters': Deductibility of Business Expenses Under the Income Tax Act, Child Care Expenses and *Symes*" in *Canadian Journal of Family Law* Volume 11, Number 1, 249.

conservative approach to the allocation of resources such as in the *Soobramoney* case.¹⁰¹ It may be best to choose a combination approach on the issue of child care where the court is asked to find a particular law or state of affairs unconstitutional, and is asked to suspend its order to allow the legislature or other competent authority to remedy the situation.¹⁰²

¹⁰¹ Op cit.

¹⁰² S 172 of the Constitution allows for such an order.

CHAPTER FOUR: THE RIGHT TO CITIZENSHIP AND CHILD CARE

In this chapter it will be argued that the right to citizenship in the Bill of Rights should entail state assistance for parents including, in particular, the provision of child care. This argument draws a distinction between the broad concept of citizenship in our Constitution and the more specific right to citizenship within the Bill of Rights which may be one of the vehicles for giving effect to the concept. Citizenship is generally understood narrowly to involve questions of nationality. It will be argued that the concept has a much wider reach and concerns the entitlements of citizens as well as questions of democratic participation in the civic and political life of the country. The chapter draws on the important insights of feminist political theory to support an expansive and transformative interpretation of citizenship in our Constitution.

This body of feminist theory highlights the gendered obstacles to citizenship. A significant constraint on women's economic, political and social participation relates to gender divisions in society which result in most of the responsibility for the care of children being taken by women. In South Africa, the vast majority of women lead exhausting lives and face terrible poverty. They spend their days caring for children and engaged in basic tasks (such as the collection of water and firewood, farming and hawking) to ensure the survival of themselves and their families. Caring for their children means that their ability to look for employment or engage in wage labour or other subsistence or economic activity is severely constrained. They also lack the time and energy to participate as actively as they would wish in community structures, representative politics and other forms of civic participation. Without some child care assistance (as well as other improvements to their position) most South African women will continue to be denied full citizenship of South Africa. It will be argued that state provision of child care is one of the important measures needed to make the promise of citizenship in our Constitution a reality for South African women. If we understand the Constitution to require transformation of our society, then the right to citizenship needs to be given substantive meaning.

This chapter first discusses the political theory, feminist and legal theory debates about the meaning of citizenship. It also examines the relationship between citizenship and child care. It then considers the concept and the right to citizenship within our Constitution and looks at how the issue of child care may be able to be framed within the right to citizenship.

4.1 THE MEANING OF CITIZENSHIP

4.1.1 Theories of Citizenship

There is a burgeoning literature among political theorists about the meaning of citizenship.¹ Certain feminist writers have recently begun to engage with this literature so as to give gender content to the meaning of citizenship², including a number of South African feminists.³ Feminist legal theorists are just beginning to draw on these theories in examining issues of constitutionalism⁴ and the role of law.⁵

Dawn Oliver⁶, in noting the diverse meanings of citizenship, sets out four major notions of citizenship which have developed historically. First, the classical Graeco-Roman idea of citizenship entailing individual political participation for the community's benefit as well as for the individual's own. Second, the Roman notion of civic republicanism involving "loyalty to the

¹ See Kymlicka, W and Norman, W (1994) "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" in *Ethics* vol 104, 352; and Mouffe, C (ed) (1992) Dimensions of Radical Democracy: Pluralism, Citizenship and Community. London: Verso.

² Notably Pateman, C (1992) "Equality, difference, subordination: the politics of motherhood and women's citizenship" in Bock, G and James, S Beyond Equality and Difference: Citizenship, feminist politics and female subjectivity. London: Routledge, 17; Yuval-Davis, N (1993) "Gender and nation" in *Ethnic and Racial Studies* Volume 16, Number 4, 621 ; Walby, S (1994) "Is Citizenship Gendered?" in *Sociology* Volume 28, Number 2, 379; Dietz, M (1992) "Context is All: Feminism and Theories of Citizenship" in Mouffe, C, op cit; and the various writings by Ruth Lister: (1990) "Women, Economic Dependency and Citizenship" in *Journal of Social Policy* Volume 19, Number 4, 445; (1991) "Citizenship Engendered" in *Critical Social Policy* Volume 11, Number 2, 65; (1995) "Dilemmas in Engendering Citizenship" in *Economy and Society* Volume 24, Number 1, 1.

³ There is an emerging South African literature in this area: see Hassim, S (1999) "From presence to power: women's citizenship in a new democracy" in *Agenda*, Number 40, 6, and Gouws, A (1999) "Beyond equality and difference: the politics of women's citizenship" in *Agenda*, Number 40, 54.

⁴ See Higgins, T (1997) "Democracy and Feminism" in *Harvard Law Review*, Volume 110, Number 8, 1657.

⁵ See Stellings, B (1993) "The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship" in *Harvard Civil Rights-Civil Liberties Law Review* Volume 28, 185, at 215-6.

⁶ In Jowell, J and Oliver, D (1994) The Changing Constitution. Third Edition, Oxford: Clarendon Press, at 442-4.

State” and “responsibility and respect” for the political process. Third, liberalism’s emphasis on the rights of the individual to participate in the political process. And fourth, the ideas associated with the theories of T H Marshall, of the citizen’s entitlements to social benefits as well as political and civil rights. Marshall’s notion moved away from liberalism’s negative protection of individual autonomy to a “citizenship of entitlement” where civil rights were complemented by an entitlement to participate politically. Crucially, this participation was based on the prerequisite of state provision of “a decent standard of living”.⁷

Marshall’s ideas were based on the concern that class inequalities were a threat to stability and nationhood in post war Britain. The state had to take responsibility for market failures and a liberal democratic welfare state⁸ was needed. The premise of such a state needed to be universal provision of civil and political but most importantly, social rights. The South African situation is in some ways similar - economic disparities threaten democracy and social cohesion. The drafters of our Constitution, in considering the type of democracy we need, chose to provide socio-economic rights in addition to civil and political rights. This reflects a substantive conception of citizenship and democracy based on the need to transform South African society.⁹

Contemporary political theory takes Marshall’s conception of citizenship as a starting point and develops two major critical responses.¹⁰ Firstly, it challenges the passive role of the citizen within this conception and argues for a more “active exercise of citizenship responsibilities and virtues”. This idea is reflected in our Constitution which speaks of “duties and responsibilities of citizenship”.¹¹ The second response involves a call to accommodate cultural and social plurality within the notion of citizenship. This raises questions about whether citizenship can be experienced in the same way by all members of society and whether special measures are needed

⁷ Ibid, at 448.

⁸ Kymlicka, W and Norman, W (1994), op cit, at 354.

⁹ See Klare, K (1998) “Legal Culture and Transformative Constitutionalism” in *SAJHR*, vol 14, Part 1, 146.

¹⁰ As set out in Kymlicka, W and Norman, W (1994), op cit, at 355.

¹¹ Section 3(2)(b).

where equal inclusion of historically excluded groups has proved to be inadequate.

4.1.2 Feminist theories of Citizenship

Feminist theorists have contributed to debate on both of these arguments. The critique of passive citizenship coming from the New Right is rejected by those on the left who argue that certain basic rights must "precede responsibilities".¹² A number of feminists have taken issue with the call for active citizenship. These 'materialist' feminists focus on the practical constraints and material conditions in society which limit women's citizenship. They point out that women have less time, opportunity and resources to participate politically or civically.¹³ This is due to the sexual division of labour in society, the double shift and the disproportionate burden of poverty on women. The way in which active citizenship is understood is also gendered. The historical and traditional location of citizenship is within the public sphere of society. Since women have been confined in many ways to the private sphere, their citizenship is of necessity attenuated.¹⁴ Women are generally under represented in formal political structures but this does not mean they show no interest in electoral¹⁵ or grassroots politics. Women, despite time constraints, are frequently engaged in community work and politics with a small 'p'.¹⁶ Thus, in many respects women are active citizens but the whole notion of citizenship needs to be reframed to take into account these social divisions.

Another important group of feminist thinkers on citizenship is what Dietz labels the 'maternalists'.¹⁷ This group emphasises motherhood as the basis for respect of women as citizens. It locates citizenship within the private sphere and urges that the values of caring, love

¹² Ibid, at 358; and Lister, R (1990), *op cit*, at 454.

¹³ Lister, R *ibid*, at 455-8.

¹⁴ Walby, S (1994), *op cit*, at 385.

¹⁵ Lister, R (1990), *op cit*, at 458 cites a USA study which showed higher voting turnout by poor women than poor men but lower participation in other electoral activities.

¹⁶ Lister, R (1995), *op cit*, at 8.

¹⁷ (1992), *op cit*, at 71.

and respect be used to inform political processes.¹⁸

Feminist critiques of the notion of active citizenship lead to arguments for the extension of additional rights and benefits to women to enable them to fulfill their responsibilities as citizens. For example, the critique of the inability of the concept of citizenship to accommodate all groups equally is addressed in the idea put forward by Iris Marion Young¹⁹ of a "differentiated citizenship" which extends procedural and substantive inclusionary measures to marginal groups. The notion of citizenship has been challenged for its "modernist universalism" and for being formulated on the basis of a male life experience.²⁰ As a result of this, Pateman²¹ argues, men and women may require different forms of citizenship (because of women's role in motherhood). But this difference should not entail the subordination of women. Pateman's approach to citizenship is inextricably linked to the concept of substantive equality. She says "for citizenship to be of equal worth, the substance of equality must differ according to the diverse circumstances and capacities of citizens, men and women".²²

Stellings²³ also looks at gender and citizenship from a rights perspective. She argues that one's capacity to participate publicly must be supported by ensuring that civil rights extend to the private sphere. She says that "citizenship shows us that public self-governance begins with private self-governance. That is, if people have both a right and a responsibility to participate in the project of governing themselves politically, then the kinds of private constraints under which people live become matters of public concern."²⁴

¹⁸ Dietz, M (1992), op cit, at 72. Also see Lister, R (1997) *Citizenship: Feminist Perspectives*. London: Macmillan, at 150; and Voet, R (1998) *Feminism and Citizenship*. London: Sage Publications, at 14.

¹⁹ Cited in Kymlicka, W and Norman, W (1994), op cit, at 369-71.

²⁰ Ibid.

²¹ (1992), op cit.

²² (1992), op cit, at 29.

²³ (1993), op cit, at 208-9.

²⁴ Op cit, at 215-6.

Drawing on the above approaches as well as the theory of rights as relationships,²⁵ the content of the right to citizenship is opened up to a range of new and exciting possible interpretations. If we look at citizenship relationally, we are required to look at how the right protects the interests of some people in society at the expense of others. Because women assume the major household and child care burdens, men are freed to participate publicly. If the right is to be 'reconceived'²⁶ so as to foster full citizenship for all society's members, it must include measures which address (and ultimately transform) the unequal social relations between men and women. With this as the broad framework, we now need to understand how the provision of child care might contribute towards the actualisation of the reconceived right to citizenship.

4.1.3 Citizenship and Child Care

Almost all of the feminist theorists dealing with citizenship referred to above note, as a key concern, the importance of child care to citizenship. The maternalist feminist framework sees women's role in child care as the basis for their citizenship. Just as male citizens go to war, women citizens engage in the care of children.²⁷ This framework is valuable in challenging the inferior social value attached to motherhood but is also constraining in that it keeps women tied to traditional gender roles and fails to challenge the fundamental social divisions that allocate different roles to men and women because of their biological role in relation to child bearing. The materialist feminist thinking on this issue is more useful. Writers such as Ruth Lister and some of the Scandinavian feminists focus on the practical issues which tie women to child care and the policy implication of these.

Women's practical inability to participate as citizens is directly linked to their child care responsibilities. The unequal distribution of child care is reinforced by the unwillingness of governments to recognise the huge amount of unpaid caring work that women do. Because of increasing longevity, caring work by many women involves care of the elderly as well as care

²⁵ Set out in chapter 1 at 1.4.

²⁶ See Nedelsky, J (1993), *op cit*.

²⁷ See Pateman (1992), *op cit*, at 21.

of children and the sick. This burden is even greater for the increasing number of single mothers.²⁸ Ruth Lister cites time-use studies which show how women in paid employment spend far more time than their male partners on domestic work, even when the men are unemployed. This position limits women's ability to participate in public life as do other factors such as lack of transport and fear of violence. While Lister's description is based on English data, much of what she describes is true of South Africa, only more so.²⁹ In a South African study looking at the position of Black working class women, there was not a single instance where a woman's husband helped with the preparation of food. The long hours and dual shift led one informant to describe herself as "exhausted to the point of death". This situation severely hampered women's participation in trade union and community organisation.³⁰

Leira,³¹ writing in the Scandinavian context, develops the idea of a dual concept of citizenship involving 'citizen the wage-earner' and 'citizen the carer'. These citizens are treated differently and unequally and there is a failure to incorporate the role of care-giving into a unified notion of citizenship. The state has a responsibility to alter this division by providing child care to enable women to access paid employment and by paying women a wage for the caring work they do. Of course, these suggestions are made in the context of wealthy countries with a history of welfarism. Nevertheless, the arguments have a universal value. The idea of large-scale child care provision or a care-giving wage may seem unrealistic in a poor country such as ours but these arguments force us to reconsider the way in which society is structured and the role of the state in contributing to or challenging the status quo.

Support for women's workplace or caring work must be accompanied by changes in the sexual division of labour. The Scandinavian countries have tried, largely unsuccessfully, to encourage men to share domestic work and parenting. Part of the problem with parental benefits for fathers is that men still "command, on average, higher rewards from the labour market than women ... (so

²⁸ Lister (1990), *op cit*, at 455-8.

²⁹ See Cock, J et al, (1984), *op cit*.

³⁰ *Ibid*, at 6.

³¹ As discussed in Lister (1990), *op cit*, at 460.

it makes) economic sense for women to make greater use of parental leave provisions than men".³² Men also often work extremely long hours which reflects society's attitude to the male worker as being unencumbered by domestic responsibilities. Ruth Lister argues for the synthesis of an "ethic of care and of justice or rights". This would address a key dilemma regarding women's social citizenship: "how to value the caring work that still falls mainly to women without trapping women into a privatized caring role that is in danger of reinforcing their exclusion from citizenship's public face."³³ Adequate provision of child care is a central dimension of this endeavour.

In South Africa, the ending of Apartheid brought with it the promise of equality of opportunity and the belief that all South Africans were valued citizens of a society undergoing transformation. Without serious efforts to address the sexual division of labour and assist women with child care responsibilities, full citizenship for all South Africans will remain elusive.³⁴

4.2 CITIZENSHIP IN THE CONSTITUTION

There are two important sections of the Constitution dealing with citizenship. The first is section 3 of the Constitution. Entitled "Citizenship", it is part of Chapter 1 of the Constitution, the Founding Provisions. The section reads as follows:

3. (1) There is a common South African citizenship.
- (2) All citizens are -
 - (a) equally entitled to the rights, privileges and benefits of citizenship; and
 - (b) equally subject to the duties and responsibilities of citizenship.
- (3) National legislation must provide for the acquisition, loss and restoration of citizenship.

³² Lister (1995), op cit, at 19.

³³ (1995), op cit, at 33.

³⁴ See Liebenberg, S (1999) "Social citizenship - a precondition for meaningful democracy" in *Agenda*, Number 40, 59.

The other important reference to citizenship in the Constitution is section 20 of the Bill of Rights also entitled "Citizenship". This section simply states that "no citizen may be deprived of citizenship". "Citizenship" is not defined here. The corresponding section in the Interim Constitution entitled "Citizen's rights" which was more detailed, has been replaced by the more pared down phrasing. The earlier section provided that "Every citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall without justification be deprived of his or her citizenship". The references to entering, remaining in and leaving the Republic have been moved to section 21 dealing with "Freedom of movement and residence" which seems to indicate that the drafters reconsidered the earlier conflation of those concepts with the right to citizenship. The removal of the words "without justification" result in a more categorical right and seem to indicate the greater importance attached by the drafters to this right.

By reading section 3 and section 20 together it becomes clear that there are two dimensions to citizenship in our Constitution. The first relates to the issue of what qualifies a person as a citizen of South Africa and matters related thereto.³⁵ Section 3(3) refers to national legislation which deals with this. The second dimension follows from the first ie: having been defined as a citizen, the Constitution entitles one to 'rights, privileges and benefits' and creates 'duties and responsibilities' of citizenship. This more substantive notion of citizenship entails active participation in all aspects of society and promises that the preconditions for such participation will be equally provided to all citizens.³⁶

Does the right to citizenship in section 20 deal with this second, more substantive notion of

³⁵ This issue has been canvassed to some extent by the courts in cases dealing with the rights of permanent residents - *Larbi-Odam and others v Member of the Executive Council for Education (North-West Province) and another* 1997 (12) BCLR 1655 (CC); and aliens - *Certification of the Amended Text of the Constitution of the Republic of South Africa 1997* (1) BCLR 1 (CC) at paras 17-21. The references in the Bill of Rights reserving certain rights for 'citizens' (sections 19, 20, 21 and 22) refer to citizenship rights in the first sense ie: they are rights which are only extended to those who possess South African citizenship. Whether non-citizens should be entitled to the right to citizenship in its second and broader sense is debatable but will not be considered here.

³⁶ See John Dugard's definition of citizenship as a constitutional law term describing the "status of individuals internally, particularly the aggregate of civil and political rights to which they are entitled" in (1994) *International Law - A South African Perspective* Kenwyn: Juta, 173-4. Our Constitution seems to go further by providing socio-economic rights as well as offering benefits and privileges. It also requires citizens to fulfill duties and responsibilities.

citizenship, or does it only mean that one's nationality cannot be taken away? Is section 20 a right at all, or is it simply a protection as indicated by its negative phrasing? Why is there reference to nationality elsewhere in the Bill of Rights and is the concept interchangeable with the concept of citizenship? What is the relationship between section 20 and section 3 of the Constitution? These are very important questions which have been given scant attention by either the courts or by academic writers since the enactment of the new Constitution. In order to answer these questions, judicial and academic references to citizenship in the Constitution will be examined. The position under the United States and Canadian Constitutions will also be briefly discussed. The proposed proper interpretation of citizenship in the Constitution will be advanced.

4.2.1 Citizenship v Nationality

Some of the leading South African constitutional law textbooks have given only passing attention to the right to citizenship.³⁷ Others³⁸ give greater attention to the right to citizenship but collapse its meaning with that of nationality. South African politicians and lawyers use the terms interchangeably as does our legislation.³⁹ (For example, the South African Citizenship Act 44 of 1949 and the new South African Citizenship Act 88 of 1995).⁴⁰ John Dugard offers definitions of the two terms: Nationality is an international law term dealing with "the legal connection between the individual and the state for external purposes".⁴¹ It concerns matters such as travelling on a South African passport. Citizenship is a constitutional law term describing the

³⁷ There is a brief section which largely conflates nationality and citizenship in Davis, D, Cheadle, H, Haysom, N (1997) Fundamental Rights in the Constitution: Commentary and Cases, Kenwyn: Juta; There is no dedicated chapter on citizenship in Chaskalson, M, Kentridge J, Klaaren, J, Marcus, G, Spitz, D and Woolman, S (1996) Constitutional Law of South Africa, Kenwyn: Juta.

³⁸ Rautenbach, I and Malherbe, E (1997) Constitutional Law, Second Edition, Durban: Butterworths, 43-4; Devenish, G (1998) A Commentary on the South African Constitution, Durban: Butterworths, 37 and 63.

³⁹ Dugard, J (1994) International Law - A South African Perspective, Kenwyn: Juta, 173-4.

⁴⁰ Keightley, R (1998) "The Child's Right to a Nationality and the Acquisition of Citizenship in South African Law" in *SAJHR* vol 14, part 3, 411, at 412-3.

⁴¹ *Op cit*, 173.

"status of individuals internally, particularly the aggregate of civil and political rights to which they are entitled".⁴² This is based on Appellate Division authority in the judgment by Nestadt JA in *Tshwete v Minister of Home Affairs*.⁴³ The distinction is particularly important in South Africa's recent past where black South Africans who had nationality were denied citizenship (for example, people who were forced to become "citizens" of non-independent Bantustans but were able to travel on South African passports)⁴⁴. It therefore seems correct to view the citizenship section in the Bill of Rights as entailing something other than a protection of nationality since the two concepts have quite distinct meanings.

4.2.2 Nationality in the Children's Rights Clause

The above distinction is supported by the use of the term nationality elsewhere in the Bill of Rights. Section 28 of the Constitution dealing with children's rights refers to the right of a child to "a name and a nationality from birth". The word 'nationality', like every word in the Constitution, was chosen deliberately to entail a particular meaning. Keightley⁴⁵ seems correct in suggesting that 'nationality' here entails the child's relationship with the state in international law rather than the domestic relationship with the state involved in citizenship. Section 28 thus covers children who are not South African citizens and who are entitled to a nationality which may not be South African so as to protect them against statelessness. It is submitted that the use of the word 'nationality' indicates a clear distinction within the Constitution between the terms 'nationality' and 'citizenship' with nationality involving international law issues and citizenship entailing the relationship between the state and its subjects.

4.2.3 Constitutional protection of citizenship in Canada and the USA

⁴² Ibid.

⁴³ 1988 (4) SA 586 (A) referred to in Dugard, J (1994) *ibid*, and in Keightley, R (1998), *op cit*, at 412.

⁴⁴ Keightley, *op cit*, at 413.

⁴⁵ *Op cit*, at 414-5.

Canadian and American law provides little assistance in the interpretation of our citizenship clause. The Canadian Charter of Rights and Freedoms confers certain rights upon citizens but does not include citizenship itself as a right. Hogg⁴⁶ says that it is unlikely that the courts will develop a definition of citizen apart from its statutory meaning (relating to issues of nationality). Thus he suggests that the term 'citizen' "essentially means citizenship as legislated from time to time by the federal Parliament". The Canadian experience is therefore unhelpful in trying to understand our Constitution's citizenship provisions.

The United States Constitution contains a more substantive reference to citizenship. The Fourteenth Amendment says: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...". But the US Court's limited reference to and interpretation of this right also fails to provide us with any useful precedent. Tribe⁴⁷, quoting a 1941 judgment, notes that the Supreme Court has "greatly narrowed the rights that attach to national citizenship so that 'instances of valid 'privileges or immunities' must be but few'". The clause has been referred to as 'almost forgotten' and is often treated as 'essentially dormant'.

In the absence of useful comparative jurisprudence, our Constitution's reference to citizenship needs to be explored in the context of our own particular history and in light of the values⁴⁸ of our Constitution.

4.2.4 Citizenship as a Constitutional right ?

Before discussing the meaning of citizenship in the Bill of Rights, a prior debate needs to be

⁴⁶ Hogg, P (1993) Constitutional Law of Canada. Third Edition (Supplemented) Toronto: Carswell, Volume 2, 34.1(d)

⁴⁷ Tribe, L (1988) American Constitutional Law. Second Edition New York: The Foundation Press, 548.

⁴⁸ These are set out in section 1 of the Constitution and include, *inter alia*, dignity, equality, human rights, democracy and freedom.

resolved ie: does section 20 create a right to citizenship ? The section is phrased negatively - "no citizen may be deprived of citizenship". It has been suggested⁴⁹ that as a result of this phrasing people are not provided with a right to citizenship. Instead, they need to have a preexisting claim to citizenship conferred to them by legislation (the South African Citizenship Act) which is then protected by section 20. While the section may not guarantee a right to the acquisition of citizenship, it is submitted that once citizenship has been acquired, section 20 guarantees the full content of the right of citizenship to citizens. The fact that it is negatively phrased does not detract from the argument that all the elements of citizenship attach to citizens by right and they cannot be deprived of these. This is supported by the location of section 20 within the Bill of Rights (Chapter 2 of the Constitution). Section 7(1), the introductory section of the chapter, states that: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." This seems to indicate that the entire contents of the chapter are regarded as rights. Section 7(2) says that the rights in the Bill of Rights must be respected, protected, promoted and fulfilled by the state. It seems unlikely that this requirement applies only to those sections of the Bill of Rights which specifically mention the word 'right'. Similarly, section 7(3) which makes the rights subject to the limitation clause must apply to all sections in the Bill. It seems highly unlikely that certain sections of the Bill would be exempt from a limitations analysis simply because the word 'right' does not appear within them.

4.2.5 The meaning of Citizenship in the Constitution: the concept and the right

It is important to draw a distinction between citizenship as a concept and a right in our Constitution. Section 3 sets out the concept of citizenship. It is located within the Founding Provisions which means that citizenship is a foundational concept for the entire Constitution.

The concept emerges from South Africa's specific history and has been formulated in line with the values⁵⁰ that inform the 1996 Constitution. South Africa's history has involved the denial of

⁴⁹ Keightley, R (1998), op cit, 414.

⁵⁰ See note 41 above.

human rights to the majority of its people. Apartheid confiscated Black people's citizenship (in the narrow sense) through the imposition of the Bantustan system. It withheld citizenship (in the broader sense) from all non-whites through the Group Areas Act, the denial of the franchise, separate amenities and numerous other laws and policies which violated people's fundamental rights.

The new Constitution recognises that citizenship entitles citizens to rights. These rights (found in the Bill of Rights) include a full set of civil, political and social rights. But citizenship offers more than rights. It also entitles people to privileges and benefits. Thus, the Constitution envisages a state which attempts to provide for its citizens to alleviate poverty and to improve people's lives. The concept of citizenship also makes citizens subject to duties and responsibilities. This is an important assertion of the need for active participation by all citizens in the building of a new society. Both elements of citizenship (rights, privileges, benefits and duties, responsibilities) challenge the classical liberal notion of citizens as separate individuals owing nothing to others but non-interference and the notion of the state as protector of individual rights not being required to provide anything more to its citizens. Section 3 also includes the word "equally" in reference to the entitlement of citizens and the duties and responsibilities of citizenship. This ties the value of equality directly to the concept of citizenship.

The concept of citizenship also has a special relationship to democracy since active participation in society is central to a vibrant democracy, and true democracy requires that citizens be provided with the means and opportunities to make a proper contribution to the democratic process. Our Constitution is littered with references to democracy which point to its centrality - in the preamble, founding provisions, the introductory section to the Bill of Rights as well as in the limitations and interpretation section of the Bill of Rights.

The foundational concept of citizenship contains a bundle of rights and much more. It infuses the whole Constitution and needs to inform the interpretation of all of the rights in the Bill of Rights. But what is its relationship to the citizenship right in section 20 ?

Section 20 is capable of being used for the purposes of both the broad and narrow meanings of

citizenship. Clearly, a person may not be deprived of their status as a citizen of South Africa. But the section may also protect the citizen against deprivations of the full content of citizenship, as described in section 3. Section 20, the right, thus becomes one of the mechanisms for ensuring that the concept is given effect. It is a weapon which allows citizens to go out into the world and claim fulfillment of the promise of section 3.

The question this begs is whether section 20 is necessary to make claims against section 3. Are not the other rights in the Bill of Rights sufficient to realise the full meaning of section 3 ?

The Bill of Rights protects many of the civil and political rights one would expect to be associated with citizenship ie: freedom of expression (section 16), freedom of assembly (section 17), freedom of association (section 18) and the right to vote, form and campaign for political parties and stand for public office (section 19). Does the citizenship right entail anything more? Citizenship requires the full involvement of all South Africans in decision-making about their lives and the society of which they are a part. Thus, unlike section 19 dealing with formal political rights within representative structures of government, the right to citizenship covers a wider spectrum of political activity. It includes participation in 'organs of civil society' (a term used elsewhere in the Bill of Rights)⁵¹ and other forms of political participation (such as in participatory fora connected to government). Sachs J, in the case of *City Council of Pretoria v Walker*⁵² has used the term 'citizenship' in this sense. Discussing the behaviour of a formerly white city council in attempting to integrate the neighbouring black townships, he said:

Its evident purpose, substantially successful in respect of debt-recovery, was to achieve equal, across-the-board enjoyment of rights and assumption of responsibilities. It sought to establish the practices and habits of municipal citizenship...at the end of the day, the case was not really about money but about the rights and responsibilities of citizenship.

And in describing the actions of the residents he had the following to say:

The people of Atteridgeville and Mamelodi had in an earlier period used non-payment

⁵¹ Section 31(1)(b).

⁵² 1998 (3) BCLR 257 (CC), at 131-133.

for services as a weapon to secure full citizenship rights for themselves both at the national and local level. The coming into force of the Constitution after the elections of 27 April 1994 might have ushered in for them a period of palpable enjoyment of citizenship rights at the national level. Yet, at the local level where their day-to-day lives had to be lived, such a sense of inclusion had still to be constructed.

These passages point to a notion of citizenship in which people become involved in matters of importance to them at all levels of society. South Africa's history of excluding people from such involvement makes the right to citizenship particularly crucial in our new democracy. The passages also show that citizenship is about a set of rights and entitlements as well as about participation in democratic processes.

4.2.6 The relationship between Child Care and Citizenship(the concept and right)

The Citizenship right can also be used to give effect to the concept in section 3 on matters of state provision of benefits to citizens. While the various socio-economic rights in the Bill of Rights also concern such issues, the citizenship right can be used where the socio-economic rights are silent on certain important matters. Thus, the provision of child care is not given any specific mention in the Bill of Rights. Since, it is argued, child care is a requirement for the full participation of women in society, the right to citizenship should be used to ensure state provision of this benefit. The Constitution requires the eventual transformation of South Africa through the reconstruction of our society.⁵³ Power imbalances based on gender and entrenched through mechanisms such as the sexual division of labour must be altered. Child care provision is an important benefit needed to address these imbalances and transform gendered social relations.

The call for adequate state provision of child care within a citizenship rights framework needs to be taken forward by civil society and women's rights groups. That is the most likely terrain for success. There is, in addition, the possibility of child care as a citizenship right reaching the

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See Albertyn, C and Goldblatt, B (1998), op cit, at 249.

court for adjudication. Take the example of a municipally funded nursery school threatened with closure due to a budgetary reallocation by the local authority. It would be possible to approach the court to argue that the removal violates parents' citizenship rights as the facility enables (mainly mothers) to work, run homes and participate in the activities of the society. The claim could be brought under section 20 by arguing that the closure of the facility deprived citizens (in this case, parents) of their citizenship. Citizenship would be defined with reference to the concept in section 3. Thus, the rights, benefits and privileges of citizenship that were being deprived would here be the use of the nursery school. Clearly, section 20 would not be the only possible right that could be used in these circumstances and may not be the most appropriate. The equality right might be used better if it could be shown that the removal of the facility discriminates against parents or mothers of children. Nevertheless, section 20's promise that "no citizen may be deprived of citizenship" should not be limited to a narrow meaning of citizenship. If section 3 informs its use, which it should, then it is one of the rights that can be used to give effect to the concept of citizenship.

There would obviously be limitations arguments raising other priorities for municipal spending such as refuse removal, provision of public parks and libraries etc. The process of weighing up the competing needs and deciding whether the right to citizenship should be limited must entail a gender analysis which highlights the importance of child care to women's social participation.

There will be practical questions which determine how the issue of child care reaches the court based on the facts of each case. Strategic decisions will also need to be taken as to which rights to use in a particular case to frame the issue of child care. Even if child care is argued for on the basis of equality, children's rights or socio-economic rights, the concept of citizenship should be used to infuse these rights with important content. The right and the concept of citizenship need further and substantive development in academic writing and in our case law so that they become useful mechanisms for social transformation.

CHAPTER FIVE: CONCLUSION

5.1 THE IMPACT OF INADEQUATE CHILD CARE PROVISION IN SOUTH AFRICA

The provision of child care in South Africa has been shaped by our Apartheid history. From the moment the government began to support child care in the 1940s, it differentiated between racial groups, reserving the major benefits for whites. During the 1980s the government withdrew all funding for black pre-primary education and creches.

This history has resulted in limited and uneven child care provision in South Africa. Estimates of the numbers of children having access to any formal child care range from 9% to 21%. Rural African children have least access to child care. White children not only have greater access but also receive a significantly better quality of child care. Child care takes a range of forms in South Africa including home-based care, centre-based care, and home care with some link to supporting agencies. This care is provided by the state and private sector in an uncoordinated and largely unregulated manner.

The lack of child care has a significant impact on South African women. This is due to the sexual division of labour in society which results in women taking primary responsibility for the care of children and the maintenance of the home. This division is supported ideologically through the notion of the public/private dichotomy. Women's unpaid work in the household is seen as part of the private realm which provides the state with its justification for failing to intervene to improve their position. Men, while benefitting from this position in terms of less responsibility and more leisure time, also lose out since they do not develop themselves through their relationships with their children. On a more general level, men and women are both disadvantaged by gender constructs which constrain their freedom to develop to their full human potential.

In South Africa, high levels of unemployment and poverty have a particular impact on women with child care responsibilities. They have to look for work, engage in basic subsistence activities such as hawking, and gather meagre resources such as water and firewood, while looking after children. More than a third of African households are women-headed which means that millions

of South African women support their children financially and in every other way, without assistance from men. Apartheid has contributed significantly towards the breakdown of African families due to the migrant labour system. For those women with children who are in formal employment, South Africa's labour laws provide little support. There is no requirement that employers provide child care facilities or nursing breaks and little job flexibility around the needs of working mothers.

There are many reasons, economic, moral and developmental, why increased and improved provision of child care would benefit South Africa. These are some of the most common motivations: Firstly, it would prepare children to benefit from their schooling. Currently, a quarter of South African pupils drop out of school in their first year.¹ This contributes towards the skills shortage, gangsterism and crime.² Secondly, it would assist in dealing preventatively with the health and nutritional needs of South African children, thus averting later burdens on the state's health care system. And thirdly, a comprehensive child care system would create thousands of new jobs.

This study has provided a less frequently articulated motivation for improved child care. It has argued that child care is a human rights issue with important implications for gender equality and the transformation of gender relations in society. Proper provision of child care would enable South African women to participate more effectively in the economy and the civic life of our country. It would go some way towards addressing the disadvantages faced by most South African women and might assist in creating a society based on equality, dignity and freedom. It is clear from the experience of countries where child care is almost universally provided, that it alone cannot transform gender relations. Child care is nevertheless an important aspect of any systematic attempt to address gender inequality and transform gender relations in society. The government needs to play a central role in regulating and coordinating improved child care provision, even if not funding it entirely.

¹ According to research by various NGOs cited in Lund, T (1998) "Primary Schools Drop-out Crisis" in *The Cape Times*, 2 April 1998, at 1.

² Ibid.

When the African National Congress (ANC) government came to power following the first democratic elections in 1994, it was faced with a wholly inadequate and racially divided child care situation. It was also faced with very severe budgetary constraints and many competing areas of need. Since then, the government has made certain policy commitments to improving the education and care of children from birth to age five. To date, however, little has been done to give practical effect to these commitments. Reasons for this are numerous and include the resource and other constraints on government, the difficult legacy it inherited and the lack of pressure from women's organisation and worker representatives to increase child care provision.

This study has argued that child care is an important constitutional right and that the courts should be approached to compel the government to address the lack of child care. Before revisiting the constitutional arguments put forward in this study, this conclusion will briefly outline some of the policy considerations (discussed in Chapter 2) which are involved in providing increased child care in South Africa. The chapter will then discuss the relationship between the rights arguments and the policy issues in examining the strategic considerations underlying the rights-based approach.

5.2 OPTIONS TO IMPROVE CHILD CARE PROVISION

A major consideration in any effort to improve child care provision is obviously the cost of such provision. Any child care system that is developed must reach the largest number of people who need it, while attempting to provide a high quality of care within a limited budget. This is obviously an extremely difficult task. A number of South African studies have made various proposals as to how this could be done.

The Naledi study envisages a collaboration between workers, parents, communities and the state. Naledi supports the 'Columbian' model where the state provides housemothers with training and delivers certain services (such as food and health care). The state pays part of the housemother's salary while parents pay a small fee and also give practical assistance to the housemother such as cleaning and shopping for her. The other option that Naledi supports is the company multi-centre where the employer provides child care facilities at the workplace and in communities.

While these centres would only offer facilities for the children of workers, they could assist community child care centres with training and other support.

The Naledi proposal, due to its concern to assist working parents, is centred around the custodial function of child care. In contrast, the World Bank study concentrates on meeting the educational needs of children. It proposes that government cover the pre-school costs of all five year olds and subsidises certain under fives, based on need. The study recommends that communities take responsibility for aspects of the construction and maintenance of child care facilities. The state would pay certain of the costs while parents' fees would have to cover the remaining expenses.

Both studies mention the figure of R3 billion per year as adequate to provide universal access to child care. This figure is relatively small within the context of the overall education budget (approximately R48 billion) and the total government budget. A third study by Liddel and Kemp does not propose universal provision of child care because of cost. It suggests that 30% of black children should be given state support for child care. This group would be made up of the underprivileged children of working mothers. Their study emphasises the custodial benefit of child care based on the argument that resources are better used on primary education in order to address school failure rates. It also argues that supporting mothers with child care will uplift women-headed families which will serve a broader developmental objective.

In considering any of these options in the planning of a child care system, South Africa needs to learn from the experiences of other countries. At the same time, however, any child care system must be appropriate to our particular conditions. The Scandinavian model of state provided, centre-based care is clearly desirable though obviously much too costly. We should learn from some of the Latin American countries that require employers to provide child care but must also be aware that the state and communities must share in this responsibility. The North American experience teaches us that tax rebates often help the middle classes rather than the most needy parents and children. The Australian model is more comprehensive in providing child care support to work seekers. However, like the Scandinavian model, it is too costly to implement in South Africa.

The local and overseas research points to the enormously challenging task of developing a workable child care model for South Africa. This study has not tried to meet this challenge. Instead, it has offered an understanding of the issues involved in child care in South Africa and some of the factors that must be considered in any legal and policy reform process.

5.3 WHAT THE CONSTITUTION CAN OFFER TO IMPROVE CHILD CARE PROVISION

South Africa's Constitution is an expansive and progressive document which aims to 'improve the quality of life' and "free the potential" of all people. The Bill of Rights must be interpreted so as to create a society based on dignity, equality and freedom. This study has argued that a number of rights in the Bill of Rights could be interpreted so as to entail a constitutional right to child care. The study has chosen to focus on the rights to equality and citizenship. These traditional 'first generation' rights have been interpreted substantively which has enabled a positive claim for child care to be brought under these rights.

5.3.1 The right to equality

The study has argued that the majority of primary care-givers of children are women. This responsibility adds to the existing burdens on women in society. The right to equality should be used to address the structural disadvantages that women, particularly poor, black women face and to contribute towards the transformation of gender relations in society.

The right to equality is a complex right and can therefore be used in different ways to found a claim for child care. A claim might be brought under the anti-discrimination sub-section (s9(3)), to defend a state programme (s9(2)) or as a substantive right under the 'equal before the law' sub-section (s9(1)) of the right. The study has argued that s 9(1) contains a positive and forward looking approach to equality which goes beyond the more remedial approaches of s 9(2) and (3). The fuller and more visionary meaning of substantive equality is located in s 9(1) which makes it the appropriate vehicle for a claim for child care. But even if a claim for child care is brought under s 9(3), it should be given an expansive interpretation. This means that the anti-

discrimination aspect of the equality right could require the provision of child care where it is absent based on the argument that the lack of child care results in unfair discrimination. This goes beyond a more limited anti-discrimination claim where, for example, child care benefits are differentially allocated.

The study has noted the endorsement by the Constitutional Court of the notion of substantive equality but criticises it for locating this issue largely within s 9(3) rather than in s 9(1). It seems likely that the arguments advanced in this study will have to be dealt with by the Court when appropriate cases, framed in terms of s 9 (1), reach the Court.

The study has looked at the relationship between the equality right and the limitations enquiry. It is at this stage of considering a claim for child care that the court will have to deal with the response that there are no resources to provide child care. The courts have shown some reluctance to make decisions involving the allocation of state resources. The court's response to a claim for child care is likely to depend to a great extent on the way a claim is framed and the facts of the particular case.

5.3.2 The right to citizenship

The right to citizenship has been given very limited consideration by our courts. It is traditionally understood as a right dealing with issues of nationality. This study has argued that citizenship has a much wider meaning. It involves the democratic participation by citizens in the civic and political life of the country. This meaning accords with the definition of citizenship found in much of contemporary political theory. Feminist theorists have challenged this notion of citizenship by arguing that the constraints on women's full participation in society prevent them from accessing the full entitlements of citizens. This study has argued that we need to reconceive the right to citizenship along feminist lines, ie: in order to foster full citizenship for all society's members, the unequal relations between men and women must be addressed.

The study has argued that citizenship is both a concept and a right in our Constitution. The concept (in s 3) entitles citizens to a full set of rights. It also provides citizens with privileges and

benefits while making citizens subject to duties and responsibilities. The right to citizenship (in s 20) is one of the mechanisms which may be used to give effect to the concept to ensure that the promise of citizenship is fulfilled. The study has used the concept and the right to citizenship as the basis for a claim for a right to child care. Lack of child care is a critical obstacle to women's full and equal citizenship. Therefore, if the right to citizenship is to have meaning, women need to be provided with child care and other assistance which will enable them to participate properly in society. Even if the right in s 20 is not regarded as the best basis on which to found a claim for child care, the concept of citizenship in s 3 (as understood in this study) should infuse a claim based on any other right.

Again, resource issues will arise at the stage of the limitations enquiry and much will depend on the way in which a particular case reaches the court.

The two chapters dealing with constitutional rights have concluded that the rights to equality and citizenship can be used to found a claim for child care. They have however argued that a claim against the state for universal provision of child care is unlikely to meet with success. This is because the state is likely to argue that it does not have the resources to meet such a claim. The court is unlikely to order it to do so. Does this mean that rights-based claims for child care are useless? This study suggests that such claims are important as one amongst a number of different strategies to address the lack of child care. The way in which such claims are brought is also of critical importance. It is to these strategic considerations that this conclusion now turns.

5.4 THE STRATEGIC USE OF CONSTITUTIONAL RIGHTS

Attempts to require the state to coordinate, fundraise and develop policy for the provision of child care need to take a number of forms. Policy proposals must be developed based on thorough research. Advocacy and lobbying needs to take place. Educational organisations need to come together with trade unions and women's organisations so as to develop an alliance of organisations working for child care. The private sector needs to be approached for funding and other assistance.

All of these methods need to be pursued to ensure that child care becomes a government priority and to make maximum use of all the resources (research, existing child care projects etc) already available concerning of child care. The law should also be used as an additional weapon to ensure improved child care provision.

This study proposes that the Constitution should be used to bring a claim for child care to court in South Africa. If such a claim succeeded, the court would develop a rights framework within which to locate the issue of child care. This framework would be of great importance in shaping government policy on the issue. Strategically, the courts should be used where a policy process is moving too slowly and some urgency needs to be brought to bear on the government. Litigation often forces an issue and may lead to a Constitutional Court judgment which refers a matter to the legislature to remedy. Litigation can also be used to create precedent which others are then compelled to follow. For example, where a profitable company is ordered to provide child care facilities for its employees, other companies in a similar position may have to follow suit. Similarly, if one government office is required to provide child care facilities, others may feel compelled to do the same. Litigation can be used to raise awareness about the issue of child care. For example, a high profile case dealing with the lack of child care facilities in Parliament, might make the public and policy makers more aware of the importance of child care. The study pointed to the ideas of Molyneux and Moser³ regarding practical and strategic gender needs. These ideas are applicable when considering strategic litigation. Moser gave the example of a policy decision to locate child care facilities at the father's workplace. This would assist women with their practical need for child care. It would also meet a strategic gender need by involving men in responsibility for children and creating the possibility for the transformation of gender relations in society. This example could be followed in a case requiring a municipality to redirect resources used for child care away from wealthy areas to poorer ones. The applicants could ask the court to make an order which might involve locating child care facilities near fathers' workplaces.

This study shows that child care is a critical area of need in South Africa which has major

implications for women's lives and gender relations in our country. Our Constitution offers the possibility of improving this situation for the benefit of all South Africans - women, children and even men.

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