

Chapter 56D

Social Security

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Health care, food, water and social security:

(1) Everyone has the right to have access to:

- (c) Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative measures, within its available resources, to achieve the progressive realization of each of these rights. ¹

56D.1 Introduction

To be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation it reduces a human in his or her dignity. The inevitable result of being unlawfully deprived of a grant that is required for daily sustenance is the unnecessary further endurance of that condition for so long as the unlawfulness continues. ²

Roughly half of South Africa's population lives in poverty. ³ Meaningful participation in constitutional democracy is often dependent on financial resources and desperate poverty deprives people of such participation. Providing measures which relieve poverty must, therefore, be South Africa's most pressing social goal.

The social security system includes a host of measures that aim to alleviate poverty: Benefits are paid to the aged, people with disabilities, pregnant women, the unemployed and for the caregivers of children. In 2011, close to 15 million South Africans received social grants. ⁴ Yet, it is uncertain whether these programmes can actually relieve poverty. Because the South African economy fails to create sufficient employment, many South Africans turn to the social security system for the income

1 Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ('Final Constitution' or 'FC').

2 *MEC, Department of Welfare v Kate* 2006 (4) SA 478 (SCA), [2006] 2 All SA 455 (SCA), [2006] ZASCA 49 ('Kate SCA') at para 33.

3 Sandra Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 12 *SAJHR* 234.

4 See Chris Bathembu 'South Africa Widens Social Security Net' (23 February 2011) available at http://www.expatica.com/za/finance_business/pensions_insurance/South-Africa-widens-social-security-net_17204.html (accessed on 26 February 2012). See also *Cele v South African Social Security Agency and 22 Related Cases* 2009 (5) SA 105 (D) at para 26 (there were 11 million recipients in 2007). Government projects that the social security budget will grow from R132 billion in the next year to R146.9 billion in 2013 and up to R171 billion by 2014. See also *South African Social Security Agency 2010/11 Annual Report* (2011) available at <http://www.sassa.gov.za/Portals/1/Documents/a197c6cc-9e32-4f9a-8d71-10aa6aa77e94.pdf> (accessed on 26 February 2012).

they require just to survive. Social grants redistribute existing wealth, but in the absence of increased employment or entrepreneurship, cannot create additional wealth.

The interdependence of rights means that individuals can only enjoy the full spectrum of constitutional rights if they have the economic security to do so.⁵ Poverty not only limits the right to social security, it limits access to food, water, housing and healthcare and the ability to exercise or enjoy political rights such as freedom of expression and freedom of association. The Constitutional Court itself has acknowledged the disjuncture between our founding constitutional values and existing conditions of material deprivation.⁶ Giving content to the right to social security is, I shall argue, an important means of closing or narrowing this gap between ideal and reality.

The constitutional jurisprudence on the right to social security remains inchoate. The rather piecemeal legislative framework and the limited corpus of case law engaging the meaning of the right to access to social security means that we can expect a broad array of constitutional challenges to legislation and policy in the future. It also means that some of what follows in these pages about the scope of the right to social security remains speculative. Hard law on the right to social security is, however, emerging. The Constitutional Court's decision in *Khosa*⁷ currently constitutes the core of this body of jurisprudence.

This chapter does not aim to cover every nook and cranny of social security law. Instead, it aims to give an overview of the meaning and implementation of the constitutional right to social security through the cases, legislation, policy and international law. I begin by considering some fine terminological distinctions in the social security field. Next, in §56D.3, I discuss the content of the constitutional right to social security as it has been developed in the case law. Thereafter, I examine some of the decisions that have dealt with the social assistance, primarily through the laws of administrative justice. I argue that these cases, rather than those dealing directly with the FC s 27(1)(c) represent the coalface of attempts to enforce the right to social security.

Having discussed the Court's decisions on social security, I turn my attention to extant social security legislation and policy. In the penultimate section, I look at international law on the right to social security and what impact it should have on

5 See C Scott 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Convention on Human Rights' 1989 (2) *Osgoode Hall LJ* 769, 786. See also Sandra Liebenberg: 'Interpretation of Socio-Economic Rights' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 33-1. *Grootboom* stated that there is a 'close relationship' between the various socio-economic rights.' *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000(11) BCLR 1169 (CC) ('*Grootboom*') at para 24. See also Albie Sachs 'Social and Economic Rights: Can they be Justiciable?' (2000) 53 *Southern Methodist University Law Review* 1389 ('We do not want bread without freedom, nor do we want freedom without bread; we want bread and we want freedom.')

6 See *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC), [1998] All SA 268 (CC) at para 8; *Grootboom* (supra) at para 2 (Constitutional Court confirmed the commitment to transformation.)

7 *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) [2004] ZACC 11 ('*Khosa*').

56D.2 Terminology

To understand the language of social security one has to navigate one's way through a maze of terminology. One encounters the following terms in the context of social security: social protection, social security, social insurance,⁸ social assistance and social welfare. This chapter will focus on social security and social assistance. The most important distinction that needs to be made is between social security and social assistance. Although the two terms are sometimes used interchangeably, we shall see that it remains important to distinguish between them.

No uniform legal definition of 'social security' exists,⁹ nor does the Final Constitution define the term. The *White Paper for Social Welfare* ('White Paper'), however, defines social security as follows:

Policies which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs.¹⁰

State social assistance includes the following four categories of benefits: those associated with old age, disability, child and family care and relief for the poor.¹¹ A striking feature of the White Paper definition of social security is that it refers to 'all people' and not 'all citizens'.

The International Labour Organisation¹² defines 'social security' as:

The protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children.¹³

8 Elize Strydom 'Introduction to Social Security Law' in Elize Strydom (ed) *Essential Social Security Law* (2nd Edition, 2006) 7 (Strydom 'Introduction').

9 M Olivier, N Smit, E Kalula & G Mhone *Introduction to Social Security* (2004) 15.

10 Department of Welfare *White Paper for Social Welfare* (1997) available at <http://www.info.gov.za/view/DownloadFileAction?id=127937> (accessed on 26 February 2012) 100.

11 *Ibid.*

12 In terms of FC s 39(1)(b), courts 'must consider international law' when interpreting the Bill of Rights.

13 International Labour Organization *Introduction to Social Security* (3rd Edition, 1984) 3 available at http://www.ilo.org/public/libdoc/ilo/1984/84B09_34_engl.pdf (accessed on 26 February 2012). See also ILO Convention 102 *Convention concerning Minimum Standards of Social Security* (1952) discussed in § 56D.6(a) below.

The White Paper definition embraces one of the most generous — and in my view preferred — constructions of 'social security'. Unlike the international definition of 'social security' the White Paper's definition includes private measures. In *Law Society of South Africa* the Constitutional Court seemed to

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adopt an expansive conception of the term by holding that compensation of road accident victims fell within the ambit of 'social security'.¹⁴

By contrast, 'social assistance' is normally funded from the general revenue of the state rather than individual contributions.¹⁵ In social assistance schemes individuals receive need-based assistance from public funds without ever contributing directly to the scheme. Social assistance schemes are administered by the state. An individual's entitlement to social assistance is generally determined by the application of a means test that assesses both the individual's current wealth and present need.¹⁶

The White Paper's use of the term 'developmental social assistance' indicates the state's recognition that a substantial percentage of the South African population cannot care for themselves because our society lacks the capacity (currently and in the medium term) to allow them to participate meaningfully in society.¹⁷ Social assistance aims at ensuring that those who are poor at least gain access to minimum income in order to satisfy their basic needs. Liebenberg, however, points out that in modern social security systems, there is no watertight division between contributory and non-contributory social security schemes.¹⁸ The international trend is to give social security a wide interpretation that recognises both types of social security.¹⁹

'Social protection', finally, is a broader term than social security. Social protection incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum living standards for all citizens.²⁰

14 *Law Society of South Africa & Others v Minister for Transport & Another* 2011 (1) SA 400 (CC), 2011 (2) BCLR 150 (CC), [2010] ZACC 25 ('*Law Society of South Africa*') at para 66 ('[T]he [Road Accident Fund] Act is itself a social security measure directed at protecting the victims of motor vehicle accidents. It may properly be seen as part of the arsenal of the state in fulfilling its constitutional duty to protect the security of the person of the public and in particular of victims of road accidents. Its principal object is to ameliorate the plight of victims rendered vulnerable by motor accidents. The state may also respect and protect bodily integrity by creating a statutory right to compensation in the event of bodily injury or death arising from a motor collision. In this sense, the impugned legislation is part of that social security.')

15 Social welfare is a synonym for social assistance. Strydom 'Introduction' (supra) at 7.

16 Olivier, Smit, Kalula & Mhone (supra) at 15.

17 D van der Merwe *Social Transformation in South Africa by Means of Social Assistance: A Legal Perspective* (1998) 20. See also Olivier, Smit, Kalula & Mhone (supra) at 23.

18 S Liebenberg 'Children's Right to Social Security, South Africa's International and Constitutional Obligations' (2001) *Socio-Economic Rights Project*, UWC 1 (Liebenberg 'Children's Rights').

19 *Ibid.*

56D.3 The constitutional right to social security

One can understand a right by the company it keeps. In the Final Constitution, social security is grouped with well-recognised socio-economic rights such as the rights to housing and health. Thus, the general jurisprudence on social security

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rights forms the backdrop against which we shall view the more specific right to social security.

I begin my discussion of the content of the right by outlining various important elements. First, I discuss the protection against negative infringement of the s 27(1)(c) right. Second, I explain the meaning of the word 'access' in s 27(1). Third, I expand on the meaning of 'reasonableness' and how it relates to the concept of a 'minimum core content' for the right. Fourth, I briefly consider the meaning of 'available resources' in the context of the right to social security. Fifth, I describe who the beneficiaries of the right to social security are. Finally, I give an overview of the existing case law on the content of s 27(1)(c).

(a) Negative interference

The *First Certification Judgment* held that '[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion.'²¹ In *Jaftha v Schoeman & Others* the Constitutional Court indicated that a high level of protection will be afforded in the case of negative violations of socio-economic rights.²²

The sudden suspension of a social grant probably constitutes 'negative interference' with FC s 27(1)(c).²³ The maladministration of social grants may also amount to 'negative interference.' In the context of disability grants, Nick de Villiers states that 'misinterpreted tests, mass discontinuations and the sustained failure to implement the most basic form of a hearing' likewise violate the negative dimension of the right.²⁴ The logic of negative interference also suggests that social grants that

20 See Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present — Protecting the Future* (2002) 41-42, available at www.cdhaarmann.com/Publications/Taylor%20report.pdf (accessed on 26 February 2012). As part of a comprehensive social protection package, the Taylor Commission suggested the introduction of a Basic Income Grant; the gradual extension of the Child Support Grant and reform of the current Disability Grant, Foster Child Grant and Child Dependence Grant. I discuss the Taylor Report in greater detail in §56D.5 below.

21 *Ex Parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 78. Importantly, the Court in *Jaftha* held that a negative violation of the right to housing is not subject to FC s 26(2) qualifications of 'reasonable measures', 'progressive realisation' and the availability of resources. *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC), [2004] ZACC 25 at para 31 read with para 34.

22 *Jaftha* (supra).

23 Many people claim that they are not given reasons for the sudden suspension of grant payments and some are unable to do what they need to do to get their grants reinstated (for example the old and bed-ridden).

24 Nick de Villiers 'Social Grants and the Promotion of Administrative Justice Act' (2002) 12 *SAJHR* 320.

do not keep up with inflation steadily erode the right to social security and might therefore be characterized as a form of negative interference.²⁵ However, as Sandra Liebenberg notes, the law of social security is still underdeveloped and it is not clear whether the standard for a finding of negative violation is a total deprivation of access or whether partial reductions will meet the constitutional threshold for such a finding.²⁶

(b) Access

FC s 27 confers the right of 'access to' social security. What does this mean? In the context of housing, the *Grootboom* Court acknowledged that 'access to housing' in FC 26(1) could be interpreted as a right that extends beyond an entitlement to a particular physical structure.²⁷ *Grootboom* recognizes that housing requires available land, appropriate services such as the provision of water, the removal of sewage and adequate financing.²⁸ Similarly, the right to 'access to' social security must be understood as extending beyond the payment of monthly grants to embrace all welfare measures that could allow people to escape poverty.²⁹

Nick de Villiers points out that the applicant for a social grant has no substantive right to receive a grant in terms of the Social Assistance Act but has a right to access to social assistance in terms of FC s 27(1)(c).³⁰ According to de Villiers, 'access' must, therefore, refer to 'the process by which an individual enters into the social assistance system and must include access to the decision-making process.'³¹ FC s 27(1) vouchsafes a set of procedural rights that protect a person's interest in the fair and equitable consideration of her social assistance application.³²

(c) Reasonableness

25 See Sandra Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 12 *SAJHR* 234, 241.

26 Sandra Liebenberg 'The Judicial Enforcement of Social Security Rights in South Africa: Enhancing Accountability for the Basic Needs of the Poor' in Eibe Riedel (ed) *Social Security as a Human Right* (2007) 9.

27 *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 ('*Grootboom*') at para 35.

28 Sandra Liebenberg 'Interpretation of Socio-economic Rights' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) at 33-22.

29 When it comes to children's grants, for example, the take-up of the child-support grant has been low. Access to this grant can be improved by properly publicizing the grant, removing administrative barriers to receiving the grant and changing the onerous requirements that have to be met in order to get access to the grant. See R Liffmann, B Mlalazi, V Moore, S Ogunrombi & M Olivier 'Scope of Application' in M Olivier, N Smit, E Kalula & G Mhone *Introduction to Social Security* (2004) 34.

30 De Villiers (supra) at 322. De Villiers writes that the judicial mechanism available to protect the rights of persons with disabilities is due process (legal remedy through courts).

31 *Ibid.*

The right to social security is — like the other rights in FC ss 26 and 27 — a qualified socio-economic right. In terms of s 27(2), the state is required to 'take *reasonable* legislative and other measures *within its available resources*, to achieve the *progressive realisation*' of the right to social security.³³ The policy of government to focus on developmental social assistance corresponds with the idea of progressive realization as expressed in FC s 27(2).³⁴

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The *Grootboom* Court interpreted the phrase 'progressive realisation' in FC s 26(2) to impose a duty on the state progressively to 'facilitate the accessibility of housing by lowering the legal, administrative and financial hurdles over time'.³⁵ The state has a similar duty to facilitate the accessibility of social grants.

That still leaves the phrase 'reasonable measures'. The *Grootboom* Court interpreted reasonableness as follows:

Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative result will invariably have to be supported by appropriate well-directed policies and programs implemented by the Executive. These policies must be reasonable both in their conception and implementation...An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligation.³⁶

The *Grootboom* Court also decided that to be reasonable, measures must be comprehensive and co-ordinated and must prioritise the needs of the poorest of the poor.³⁷

If one agrees that social security aims to relieve poverty, a distinction has to be made between poor and desperately poor.³⁸ The use of a means test to determine eligibility for social grants can be seen as an attempt to prioritize the needs of the most vulnerable South Africans.

As it stands, however, significant numbers of the poorest of the poor cannot access the current social assistance system. In addition, many children who live on

32 Ibid at 323. De Villiers offers two additional interpretations of FC s 27(1)(c). First, if the process of reviewing an application simultaneously determines an applicant's constitutional right of access to social assistance, then the decision constitutes administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000. The second related gloss on FC s 27(1)(c) is that the state is obliged to provide a coherent system by which people can obtain access to social grants and that fair administrative action is an unmistakable part of such system. Ibid.

33 Liebenberg 'Interpretation of Socio-Economic Rights' (supra) at 33-5.

34 *Grootboom* (supra) at para 44 ('Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though strategically successful, fail to respond to the needs of those most desperate, they may not pass the test').

35 Sandra Liebenberg 'Children's Right to Social Security, South Africa's International and Constitutional Obligations' (2001) *Socio-Economic Rights Project*, UWC 1 (Liebenberg 'Children's Rights') 9.

36 *Grootboom* (supra) at para 42.

37 Ibid at para 44.

the streets and many persons with chronic illness or moderate disabilities do not meet the criteria for care-dependency or disability grants. Difficulties regarding access and the implementation of various means tests (far from facilitating social security) often serve to exclude the poorest of the poor. Such problems with the most basic forms of access suggest that the social security system as a whole does not satisfy a *Grootboom*-based test for reasonableness.³⁹

(d) Reasonableness and the minimum core

The *Grootboom* Court adopted a standard of reasonableness — rather than the international benchmark of a 'minimum core' — for determining whether the state

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has discharged its duties under FC s 27(2).⁴⁰ Since *Grootboom*, the Court has repeatedly re-affirmed its commitment to the reasonableness approach and rejected attempts to adopt some form of the minimum core.⁴¹ This choice has elicited significant criticism from some academics.⁴² Whatever its merits, the reasonableness standard is now fully entrenched in South African law.

Despite the doctrinal choice by the Constitutional Court, the Committee of Inquiry into a Comprehensive System of Social Security (also known as the 'Taylor Commission') recommended that the obligation to take reasonable measures should translate into making a *minimum* level of social security available to everyone.⁴³ The Committee also stated that while the state is rolling out medium to long-term programmes, it must still provide 'temporary relief' to the most vulnerable of the poor.⁴⁴

38 The definition of poverty is the subject of considerable debate. See W Magasela 'Towards a Constitution-based Definition of Poverty in Post-Apartheid South Africa' in S Buhlungu, Daniel Lutchman & R Southall (eds) *State of the Nation: South Africa 2005-2006* (2006) 46. By some state-accepted indicators, there has been an increase in poverty since 1994. See Statistics South Africa *Earning and Spending in South Africa: Selected Findings and Comparisons from the Income and Expenditure Survey of October - 1995 and October 2000* (2002).

39 See C Haarman *Social Assistance in South Africa: Its Potential Impact on Poverty* (2000) (unpublished PhD thesis, University of the Western Cape) 105.

40 See Committee on Economic, Social and Cultural Rights *General Comment No 3: The Nature of States Parties Obligations* (Fifth Session 1990) (art 2 para 1) UN doc E/1991/23, paras 9-12 (each State Party is under 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations').

41 See *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15 at paras 34 and 38 (Court held that in *Grootboom* 'Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1)'); and *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), [2009] ZACC 28, 2010 (3) BCLR 239 (CC) ('Mazibuko') at paras 52-55 (rejecting an argument that people should be entitled to a minimum of 50 litres of water per day).

42 See, for example, David Bilchitz *Poverty and Fundamental Rights* (2007) ('Poverty').

According to Williams, the reasonableness standard and the minimum core standard are not mutually exclusive. Williams writes that the Court in *Khosa*, without expressly stating that it was doing so, articulated at least one 'minimum core obligation' under FC s 27(1)(c): permanent residents are entitled to social security benefits.⁴⁵ For Williams, *Khosa* suggests that reasonableness analysis can be used to build up, over time, a notion of what constitutes a minimum core.⁴⁶ Others — particularly David Bilchitz⁴⁷ — have supported a similar analysis concluding that

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the reasonableness must include some form of minimum core to be a meaningful tool of analysis.

(e) Beneficiaries of the right

Liebenberg notes that the restriction of social assistance to those who are unable to support themselves and their dependants raises the question of whom the Final Constitution envisages as being 'unable' to care for themselves and their dependants.⁴⁸ It is clear that the right extends to those who cannot afford to provide for their own or their dependants' basic needs because they are old, very young or because they are living with a disability. The critical issue, according to Liebenberg, is 'whether the right has a broader scope, extending to those who are unable to support themselves due to an inability to find employment, very low wages or insufficient access to productive assets.'⁴⁹ Liebenberg argues that the high levels of structural unemployment in South Africa support a broader interpretation of the persons the right should be understood to protect.⁵⁰

43 Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present — Protecting the Future* (2002) 43, available at www.cdhaarmann.com/Publications/Taylor%20report.pdf (accessed on 26 February 2012) ('While the *Grootboom* case has emphasized that it is incumbent on the state to take reasonable measures, to give effect to each one of these rights, the committee believes that this should be translated into making available a minimum level or measure of provision for everyone. As a result, it may be advisable for the State to stipulate up front its considered minimum obligations for service delivery, such as it is doing for the free water programme, and its intended schedule for progressively realizing this.')

44 Ibid 'In all likelihood, the state will be unable to ensure that all of its capability and asset programmes have built-in measures for temporary relief for those most vulnerable.'). This view is consistent with the emphasis *Grootboom* placed on not neglecting particularly vulnerable groups. See *Grootboom* (supra) at para 44.

45 Lucy Williams 'Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South Africa Analysis' (2005) 21 *SAJHR* 450 (Williams writes that the court in *Khosa* effectively granted permanent residents individually enforceable constitutional entitlement).

46 Ibid.

47 Bilchitz *Poverty* (supra).

48 Sandra Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 12 *SAJHR* 234, 239.

49 Ibid.

The right to social security is intimately and inextricably linked to the rights to dignity and equality. Liebenberg writes that dignity demands that society does its utmost to ensure that those groups who are unable to secure access to basic goods through paid employment still receive those goods required to live a dignified life.⁵¹ Mokgoro J identified the connection between social security and equality in *Khosa* by recognizing that 'decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society'.⁵² In *Mashavha v President of the RSA*, Van der Westhuizen J noted that the right to equality and the right to social assistance required fairness and equality in relation to 'distribution and application of resources and assistance.'⁵³ These cases suggest that there may be support for including the unemployed in the net of those entitled to claim social assistance in terms of s 27(1)(c).

(f) Case law

(i) Constitutional Court

The Constitutional Court has heard only one case focusing directly on the right to social security: *Khosa*.⁵⁴ In addition, it has heard four cases tangentially dealing

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with the s 27(1)(c) right: *Mashavha*,⁵⁵ *Minister of Social Development*,⁵⁶ *Njongi*⁵⁷ and *Law Society of South Africa*.⁵⁸ In *Khosa* the Court had to decide whether the right to social security extends to permanent residents. *Mashavha* concerned the more mundane question of whether social security should be provided by national or provincial government. *Minister of Social Development* involves an application to

50 Ibid.

51 See S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 17.

52 *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC), [2004] ZACC 11 ('*Khosa*') at para 74. For a general discussion of *Khosa*'s place within South African dignity jurisprudence, see Stu Woolman 'Dignity' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

53 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC), [2004] ZACC 6 ('*Mashavha*') at para 57.

54 *Khosa* (supra).

55 *Mashavha* (supra).

56 *Ex Parte Minister of Social Development* 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC), [2006] ZACC 3 ('*Minister of Social Development*').

57 *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC), 2008 (6) BCLR 571 (CC), [2008] ZACC 4 ('*Njongi*').

58 *Law Society of South Africa & Others v Minister for Transport & Another* 2011 (1) SA 400 (CC), 2011 (2) BCLR 150 (CC), [2010] ZACC 25 ('*Law Society of South Africa*').

extend the order granted in *Mashavha*. In *Njongi*, the Court considered the claim of an individual for back pay of her social grant. Finally, *Law Society of South Africa* addresses limitations on the benefits paid to victims of road accidents. I address *Khosa*, *Mashavha* and *Minister of Social Development* in detail and *Law Society of South Africa* briefly. *Njongi* is covered in the subsequent section.

Khosa offers the most detailed available account of the right to social security. The applicants in *Khosa* were Mozambican citizens living in South Africa as permanent residents. They sought an order confirming the invalidity of sections of the Social Assistance Act, 1992 ('SAA 1992')⁵⁹ that disqualified non-citizens from receiving social grants.⁶⁰ Had the applicants been South African citizens they would have been entitled to receive welfare grants in terms of SAA 1992.

In the High Court the applicants argued that the requirement of citizenship infringed their rights to equality and to social security. The High Court agreed and struck down the challenged provisions. The effect of striking down the offending sections and failing to replace them with any other limiting criterion placed an obligation on the state to provide social assistance to all indigent persons. It was clear that such far-reaching consequences went beyond the relief originally sought.⁶¹

Writing for the majority of the Constitutional Court, Justice Mokgoro held that the right to social security vests in 'everyone' and that permanent residents were therefore bearers of the rights. The Court further held that the 'intentional, statutorily sanctioned unequal treatment of part of the South African community' had a 'strong stigmatizing effect' and therefore violated the right to equality.⁶²

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To remedy this defect, the Court read in the phrase 'permanent resident' into each of the challenged provisions.⁶³

Williams believes that the difference between *Khosa* and other socio-economic rights lies in the fact that *Khosa* did not deal with citizens waiting in the queue for

59 Act 56 of 1992.

60 The applicants were denied old-age grants (in terms of s 3(c) of the Social Assistance Act 59 of 1992) and the child-support grants and care-dependency grants reserved for South African citizens (in terms of the Welfare Laws Amendment Act 106 of 1997).

61 See *Khosa & Others v Minister of Social Development* Case No 25455/02 (Unreported decision of the Transvaal Provincial Provision).

62 *Khosa* (supra) at para 74.

63 Notwithstanding the outcome in *Khosa*, the Social Security Act 13 of 2004 must also be applicable to refugees. The courts have taken the view that, unless the relevant provision indicates that a constitutional right is available only to citizens, it is available to everyone. See *Tettey v Another v Minister of Home Affairs & Another* 1999 (3) SA 715, 729 (D), 1999 (1) BCLR 68 (D) and *Patel & Another v Minister of Home Affairs & Another* 2000 (2) SA 343, 349 (D), [2000] 4 All SA 256 (D). See also *Submission to the Department of Social Development on the Regulations in terms of the Social Assistance Act, 2004* (14 March 2005)(Manuscript on file with the author). In addition, in terms of art 2 of the Convention on the Rights of the Child (ratified by South Africa in 1995), a state party to the Convention may not discriminate against or deny any of the rights in the Convention (including social security) to a child due to the child's national origin.

progressive realization of their right but with a class of persons entirely excluded from the scheme of social grants created by Parliament. In *Khosa*, the focus shifted from the reasonableness of measures for progressive realization to the reasonableness of exclusion. As a result, the *Khosa* court granted specific individuals (permanent residents) an individual legally enforceable entitlement. This departure from the Court's general refusal to grant specific relief was interpreted as indicating that the Court may be moving towards a jurisprudence of socio-economic rights that recognizes 'substantive individually enforceable content.'⁶⁴

However, the Court's more recent judgments in *Mazibuko*⁶⁵ and *Nokotyana*⁶⁶ make it clear that it has not altered its stance on socio-economic rights generally. Rather, it seems to be the fact that, in *Khosa*, the denial of social assistance was combined with unfair discrimination that led the Court to simply expand a socio-economic right to a group of previously excluded people. As Mokgoro J wrote in *Khosa*: 'What makes this case different to other cases that have previously been considered by this Court is that, in addition to the rights to life and dignity, the social-security scheme put in place by the state to meet its obligations under section 27 of the Constitution raises the question of the prohibition of unfair discrimination.'⁶⁷ If the government decided to exclude permanent residents from receiving water, healthcare or housing, one would expect the Court to react in the same way it did in *Khosa*. Yet that does not seem to be an indication that the Court will change its response to socio-economic rights claims that are not coupled with unfair discrimination.

RS4, 03-12, ch56D-p12

While *Khosa* concerned the core substantive question of who can claim the right to social security, *Mashavha* turned on the validity of a presidential proclamation which sought to assign the administration of the Social Assistance Act of 1992 to the provincial governments.⁶⁸ The Court declared the proclamation invalid on the grounds that the Act fell within the ambit of IC s 126(3) and was, therefore, not capable of assignment to the provinces. The *Mashavha* Court touched only briefly on the content of the rights to equality and social security. Van der Westhuizen J stated:

In my view social assistance to people in need is indeed the kind of matter referred to in section 126(3)(a), and in a wider sense envisaged by the meaning of the need for minimum standards across the nation in subsection (c). Social assistance is a matter

64 Lucy Williams 'Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South Africa Analysis' (2005) 21 *SAJHR* 450, 451.

65 *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28. For discussion of *Mazibuko*, see Daria Roithmayr 'Lessons from *Mazibuko*: Persistent Inequality and the Commons' (2010) 3 *Constitutional Court Review* 317; Malcolm Langford, Richard Stacey & Danwood Chirwa 'Water' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS3, May 2011) Chapter 56B.

66 *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2010 (4) BCLR 312 (CC), [2009] ZACC 33. For discussions of *Nokotyana*, see Redson Kapindu 'The Desperate Left in Desperation: A Court in Retreat — *Nokotyana v Ekurhuleni Metropolitan Municipality* Revisited' (2010) 3 *Constitutional Court Review* 201; David Bilchitz 'Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *SALJ* 591.

67 *Khosa* (supra) at para 44.

68 *Mashavha* (supra) at para 1.

that cannot be regulated effectively by provincial legislation and that requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic, for effective performance. Effective regulation and effective performance do not only include procedural and administrative efficiency and accuracy, but also fairness and equality for example as far as the distribution and application of resources and assistance are concerned. A system which disregards historical injustices and offends the constitutional values of equality and dignity could result in instability, which would be the antithesis of effective regulation and performance.⁶⁹

The Court suggested that it might be possible to distinguish between the budgeting and allocating of money for social grants, and the more practical matter of paying those grants. While the former clearly needed to be performed at the national level, the latter activity might be more efficiently performed at the provincial level.⁷⁰ However, since the Social Assistance Act of 1992 was not structured so as to distinguish between these two types of functions, the Court left the matter undecided. The new Social Assistance Act of 2004 places the administration primarily in the hands of national government, particularly the South African Social Security Agency.

In order to avoid unnecessary disruption, the *Mashavha* Court suspended the order for eighteen months, by which time it was envisaged that the new Social Assistance Act would be in force. However, on Saturday 4 March 2006, two days before the period of suspension was to expire, the Minister of Social Development approached the Court to request an urgent extension of the period of suspension. The new Social Assistance Act was due to come into force about a month later. The failure to extend the suspension order might threaten the ability of the government to pay social grants.

In *Minister of Social Development*, the Court refused the application because, by the time it heard the matter, the period had already expired.⁷¹ Van der Westhuizen J held that it lacked the power to extend an order that had already expired.⁷² In

RS4, 03-12, ch56D-p13

reaching that conclusion, the Court noted its concern for 'the plight of those in need of payments in terms of the [Social Assistance Act 2004].'⁷³ However, because its hands were tied by the late application, all the Court could do was remind the state that it was 'crucial for the relevant organs of government to fulfil their constitutional obligation and make every effort and to fully explore all legal possibilities to prevent the interruption of the payment of pensions and other social grants.'⁷⁴

Law Society of South Africa concerned various challenges to an amendment to the Road Accident Fund Act that would limit the benefits that victims of motor

69 Ibid at para 57.

70 Ibid at para 59.

71 *Minister of Social Development* (supra).

72 Ibid at para 38. For a discussion of the Court's power to extend suspension orders, see Michael Bishop 'Remedies' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) §9.4(e)(i)(ee).

73 *Minister of Social Development* (supra) at para 45.

vehicle accidents could claim, and prevent them from raising common-law claims against the wrongdoer. The state successfully defended a rationality challenge in part on the ground that it was an interim measure in moving to a comprehensive social security system that would offer 'life, disability and health insurance cover for all accidents and diseases.'⁷⁵ The Court accepted that the measure was part of a move towards a more 'equitable platform for delivery of social security services.'⁷⁶ It is implicit in the Court's judgment that equity is an important element of a social security system.

(ii) Eastern Cape social grant cases

The constitutional right to social security is meaningless without proper implementation and service delivery. The current social grant system is rife with corruption. The problems of corruption and maladministration of grants are particularly acute in the Eastern Cape, one of the poorest provinces in South Africa. In *Kate Froneman J* observed that for a number of years there has been a 'persistent and huge problem with the administration of social grants in the Eastern Cape'.⁷⁷ The Supreme Court of Appeal has lamented the 'conspicuous and endemic failure' of the Eastern Cape provincial government to effectively pay social grants.⁷⁸

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The result of the large-scale maladministration of social grants in the Eastern Cape has been 'a plethora of litigation in the High Court between the poor of that province and the provincial administration. In some cases the failure of the administration lies in not expeditiously considering applications for social grants. In other cases it lies in not paying what is due to beneficiaries once their applications have been approved. At times it lies even in disregard of court orders for the payment of moneys that are due.'⁷⁹ The history of the Eastern Cape government's failures and the consequent litigation as summarized by the Constitutional Court in *Njongi*.⁸⁰

74 Ibid at para 46. See also *ibid* at para 59 (Ngcobo J concurring) ('We are not unmindful of the plight of those individuals who are receiving the social welfare grants as well as those who are seeking such grants. They are entitled to be paid those grants as and when they are due. Similarly, those who are seeking such grants are entitled to have their applications considered and, if they meet the relevant criteria, to be awarded such grants. Regrettably, this application was brought ex parte and without any notice either to the applicants in the original application or to their attorneys. However, there is nothing in this judgment which prevents any person who might be adversely affected by the refusal to extend the period of suspension from approaching any court of competent jurisdiction to seek relief, if so advised.')

75 *Law Society of South Africa* (supra) at para 45.

76 *Ibid* at para 54.

77 *Kate v MEC for Welfare, Eastern Cape* 2005 (1) SA 141 (SE), [2005] 1 All SA 745 (SE) ('*Kate*'). For novel forms of constitutional relief designed to address both maladministration and the refusal to follow court orders see *Mahambehlala v MEC for Welfare, Eastern Cape & Another* 2002 (1) SA 342 (SE), 2001 (9) BCLR 890 (SE) ('*Mahambehlala*') and *Mbanga v MEC for Welfare, Eastern Cape* 2002 (1) SA 359 (SE), 2001 (8) BCLR 821 (SE) ('*Mbanga*').

78 *Kate SCA* (supra) at para 3.

79 *Kate SCA* (supra) at para 4.

The Eastern Cape social grant cases can be divided into three categories. One category consists of cases which affirm the rights of litigants to relief when social security grants are cancelled without notice. *Ngxuza* is one such a case.⁸¹ *Ngxuza* concerned a large class action on behalf of all people in the Eastern Cape whose grants had been improperly terminated during an overzealous attempt to root out fraudulent claimants. The High Court certified the class and the Supreme Court of Appeal upheld the decision.

A second category of cases concerns officials who fail to render timeous decisions regarding applications for social grants. In *Vumazonke*,⁸² the High Court held that the delay by the provincial department in taking a decision on the applicants' application for social grants was unreasonable in terms of s 6(2)(g) read with s 6(3) (a) of the Promotion of Administrative Justice Act.⁸³

The third category consists of cases in which the state fails to pay out retrospectively grants plus interest for applications that were approved after long delays. In *Kate*, for example, Froneman J ordered the Eastern Cape Department of Welfare to pay interest and retrospectively grant disbursements.⁸⁴ In the case of large-scale state contempt for court orders, Froneman J stated that the courts were obliged to devise ways to ensure compliance with court order and suggested courts could summon recalcitrant welfare officials to explain their non-compliance with court orders.⁸⁵ Failure to heed both the original order and the order to appear could be followed with a finding of contempt.⁸⁶ The decision was confirmed by the Supreme Court of Appeal.⁸⁷

Similarly, in *Njongi*, the applicant's disability grant had been inexplicably cancelled only to be re-instated nearly three years later. She brought a claim to set aside the original decision to cancel her payments and claim the outstanding

80 *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC), 2008 (6) BCLR 571 (CC), [2008] ZACC 4 ('*Njongi*') at paras 8-26.

81 *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another v Ngxuza & Others* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA) ('*Ngxuza SCA*').

82 *Vumazonke v MEC for Social Development, Eastern Cape, & Three Similar Cases* 2005 (6) SA 229 (SE) ('*Vumazonke*').

83 Act 3 of 2000.

84 *Kate* (supra).

85 *Ibid* at para 24.

86 *Ibid* at para 11 ('[I]f nevertheless, the State failed to comply with the court order of payment, the possibility of contempt of court, or at least a declaration to that effect, could help individual public officials to pay heed to their constitutional public duties.')

87 *Kate SCA* (supra).

arrear payments to which she was entitled. The High Court initially granted the claim, only to be overturned by a Full Bench on the ground that the claim had prescribed.

In the Constitutional Court Yacoob J held that the claim had not prescribed as Ms Njongi could only bring the claim once the initial decision had been set aside. More importantly, he questioned whether 'prescription could legitimately arise when the debt that is claimed is a social grant; where the obligation in respect of which performance is sought is one which the Government is obliged to perform in terms of the Constitution; and where the non-performance of the Government represents conduct that is inconsistent with the Constitution.'⁸⁸ Justice Yacoob went on to hold that, even if prescription could technically be raised in a claim involving a social grant, '[t]here is an inevitable and, in my view, moral choice to be made in relation to whether a debtor should plead prescription'.⁸⁹ In this case, the decision to raise a defence of prescription to avoid paying social grants 'was unconscionable conduct on the part of the Provincial Government'.⁹⁰ The Court expressed its displeasure through a costs order against the state on an attorney-and client scale.⁹¹

Despite this long litany of government incompetence and obstruction there was, for a time, some doubt about the remedies that were available to enforce compliance. In *Jayiya*, the Supreme Court of Appeal questioned whether courts had the power to order retrospective disbursements — plus interest — as a remedy for unreasonable delays and as a form of constitutional damages.⁹² *Jayiya* also created doubt about the ability of courts to hold recalcitrant officials in contempt of court.⁹³ Any doubt was put to rest by the Supreme Court of Appeal in *Kate*. Nugent JA awarded the applicant constitutional damages in the form of retrospective damages. He also explicitly held that there was nothing in *Jayiya* that prevented courts from holding officials who failed to implement court orders in contempt.⁹⁴ *Njongi* also specifically raised the possibility of a *de bonis propriis* costs order against the relevant officials, although the Court ultimately decided it was inappropriate.⁹⁵ Moreover, since the Constitutional Court's decision in *Nyathi* it is also possible to execute against state property.⁹⁶ Courts should not hesitate to employ the full arsenal of remedies at their disposal to ensure the payment of social grants.

88 *Njongi* (supra) at para 42.

89 *Ibid* at para 78.

90 *Ibid* at para 85.

91 For more on costs in constitutional matters, see Michael Bishop 'Costs' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, October 2010) Chapter 6.

92 *Jayiya v MEC for Welfare, Eastern Cape & Another* 2004 (2) SA 611 (SCA) at paras 8-11.

93 *Ibid* at para 19.

94 *Kate SCA* (supra) at para 30.

95 *Njongi* (supra) at paras 61-63.

The biggest challenge facing the Department of Social Development in the Eastern Cape has been internal corruption. In the Ciskei and other areas corrupt

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officials registered ghost beneficiaries and paid themselves on a monthly basis.⁹⁷ Officials from the Department also collected monies from beneficiaries who did not collect their vouchers.⁹⁸ To combat these forms of corruption, the payment system was privatized. It introduced a system of verification by way of fingerprints.⁹⁹ Similar initiatives have also been taken on the national level. In *Vumazonke*, the court attempted to address the maladministration of grants in the Eastern Cape by directing that the judgment be served on the chairperson of the South African Human Rights Commission. The chairperson was asked to consider 'whether to institute an investigation into the conduct of the respondent's department.'¹⁰⁰

It is, however, not only officials working directly with social assistance that are responsible for such corruption. Some citizens of the new Eastern Cape province exploited the fact that one could legally use identity documents of the former Transkei and Ciskei to secure more than one social grant. Others have tried to obtain social grants by applying under false identities. Some applicants applied several times until they were successful. (The success was made possible by the deficiencies of a manually driven system.¹⁰¹) The implementation of a right to social security will only be progressively realized when government has successfully addressed these problems.

56D.4 Administration of social grants – The treatment by the South African courts

A survey of recent South African social security cases show that very few cases involve constitutional issues (or *rights* issues) such as non-discrimination. Most of the litigation on social security involves the non-payment of social grants and the inadequate administration of social grants. They are, at heart, administrative law matters. Most recent cases on social security can be grouped into the following four categories:

(a) Protection of procedural interests

96 *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* 2008 (5) SA 94 (CC), 2008 (9) BCLR 865 (CC), [2008] ZACC 8.

97 See *Magidimisi v The Premier of the Province of the Eastern Cape* Case No 2180/2004 (Unreported decision of the Eastern Cape High Court) ('*Magidimisi*') at para 16, n 63.

98 *Ibid.*

99 *Ibid* at para 17.

100 *Vumazonke* (*supra*) at para 18.

101 Since the system was manually driven, it was difficult to determine whether a person applied more than once.

Beneficiaries must be given an opportunity to state their case before a grant may be suspended,¹⁰² and the government must furnish written reasons when the decision is made to cancel a grant.¹⁰³ The affected person should, finally, be informed of his or her right to appeal.¹⁰⁴

In *Sikutshwa v The Member of The Executive Council For Social Development, Eastern Cape Province*¹⁰⁵ the court considered the applicant's rights to receive reasons for the rejection of his application for a disability grant in terms of s 5(2) of the Promotion of Administrative Justice Act ('PAJA').¹⁰⁶ According to PAJA, the Department of Welfare was required to furnish 'adequate reasons' for refusal within 90 days of being requested to do so. Instead, the Department took eight months to process the request. The court indicated that the applicant was entitled to be treated with dignity and respect,¹⁰⁷ which required that he be given reasons on request for why his application had failed.

(b) Application of administrative justice rules

South African courts have widely applied administrative justice rules in social assistance matters.¹⁰⁸ Administrative justice principles play a crucial role in protecting the rights of those dependent on the support of the courts against arbitrary and unlawful state action.

Courts have often dealt with unreasonable delays in the payment of social grants and have routinely held that such unreasonable delays may amount to unlawful administrative action.¹⁰⁹ Courts emphasized that the unilateral withdrawal or suspension of grants without adherence to the principles of natural justice is unlawful and invalid.¹¹⁰

102 *Rangani v Superintendent-General, Department of Health and Welfare* 1999 (4) SA 385 (T) ('*Rangani*').

103 *Bushula & Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another* 2000 (2) SA 728 (E).

104 *Njongi v Member of the Executive Council for Social Development, Eastern Cape Province* 2005 JDR 0718 (SE).

105 2009 (3) SA 47 (Tkh), [2005] ZAECHC 18 ('*Sikutshwa*').

106 Act 3 of 2000.

107 *Sikutshwa* (supra) at para 81

108 For more on the right to administrative justice, see Jonathan Klaaren & Glenn Penfold 'Just Administrative Action' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63; Cora Hoexter *Administrative Law* (2nd Edition, 2012).

109 See *Mpanga v MEC for Welfare* 2002 (1) SA 359 (SE). See also *Mahambehlala v MEC for Welfare (Eastern Cape)* 1998 (1) SA 342 (SE)(held that more than three months to process an application for welfare amounted to an unreasonable delay.)

Irrational decisions made by social security officials will not meet the standard of administrative law. In *Rangani v Superintendent-General, Department of Health and Welfare*¹¹¹ the state's policy that a medical officer must find an applicant to be 60% disabled in order to qualify for a permanent disability grant was found to be irrational.¹¹²

Social assistance grants may only be suspended for reasons and on the grounds provided for in the relevant legislation and regulations. In *Maluleke v MEC for Health, Northern Province*¹¹³ the provincial government decided to cancel almost 92 000 grants of those it deemed to be suspect beneficiaries. The court held that the suspension was unlawful.¹¹⁴

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The High Court has also attempted to tackle the ongoing problems with the payment of social grants in a more systemic fashion. In *Cele v South African Social Security Agency*¹¹⁵ Wallis AJ held that in terms of FC s 27(2) and the right to just administrative action South African Social Security Agency ('SASSA') has an obligation to overcome the administrative problems that beset the social security system.¹¹⁶ The court held that the congestion of the Durban and Natal High Courts' rolls¹¹⁷ with SASSA's inability to properly process and pay social grants was untenable.¹¹⁸ It appeared that the system was being driven by a small group of attorneys and advocates who had created a very profitable cottage industry. To address the scourge of unnecessary and costly litigation, Wallis AJ issued a new practice directive that required litigants to first approach both SASSA and the state attorney before approaching the High Court.

(c) Class Actions

110 See *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 (E).

111 *Rangani* (supra).

112 Court held that the degree of severity of the medical condition was not rationally linked to the duration of the disability.

113 1999 (4) SA 367 (T).

114 *Ibid.*

115 2009 (5) SA 105 (D).

116 *Ibid* at para 26.

117 The court in *Cele* stated that there were approximately 300 such matters on the motion rolls in Durban during a calendar year which resulted in legal expenses of R12 million to R15 million a year.

118 The matters on the role included: (a) the suspension of social grants without the provision of reasons; (b) matters where applicants apply for social grants but receive no response; and (c) matters where the refusal of a grant has been appealed but no arrangements were made for the hearing of the appeal. *Ibid* at para 3.

Access to social assistance is enhanced by the availability of the class action. Class actions allow a large group of claimants who would be unable to act individually to act collectively to enforce their rights.¹¹⁹ In *Ngxuza*¹²⁰ the Legal Resources Centre applied to certify a class of all people whose disability grants had been improperly suspended. This included some 37 000 people with disabilities. The High Court permitted the litigation on behalf of the class, and the Supreme Court of Appeal upheld the decision.¹²¹ It identified the following requisites for a class action:

(1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives, ... will fairly and adequately protect the interests of the class.¹²²

Class actions are a particularly appropriate litigation vehicle in social security cases where the potential litigants may not have the means to act individually. It also avoids the problem of excessive litigation identified in *Cele*.

RS4, 03-12, ch56D-p19

(d) Extending social security benefits to non citizens:

In the spirit of *Khosa*, the High Court in *Centre for Child Law and Another v Minister of Home Affairs*¹²³ (also referred to as the *Lindela* case after the holding camp for refugees in Gauteng) dealt with the rights of child refugees. Specifically, the case concerned whether unaccompanied foreign children should be treated as children in need of care through the formal child protections system, or whether they could be processed through the immigration system. The Court acknowledged that there is a duty on the state to ensure basic socio-economic provision for children who lack family care, including unaccompanied foreign children. The court ordered government departments within the 'social cluster of departments' to address the problem collectively.

56D.5 Policy

Social security under the apartheid governments was described as 'fragmented, inequitable and fraud-ridden'.¹²⁴ Social security was administered by 14 different departments for different population groups and homelands.¹²⁵ From 1992 until 2006, the position was regulated by the Social Assistance Act, 1992. That entire regime has been replaced by the Social Assistance Act, 2004, which came into force

119 For more on class actions, see Cheryl Loots 'Standing, Ripeness and Mootness' in Stu Woolman, Michael Bishop Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) § 7.2(c)(iii).

120 *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E).

121 *Ngxuza SCA* (supra).

122 *Ibid* at para 16.

123 2005 (6) SA 50 (T).

on 1 April 2006.¹²⁶ The 2004 Act provides for a regime that is non discriminatory and applies throughout the whole of South Africa.

Together with the Constitution, the source of this reform was the White Paper for Social Welfare ('the White Paper'). In line with government's new focus on development, the White Paper focuses on developmental social assistance which aims to make people self-sufficient. As a result of the White Paper's interventions, South Africa now has 'one of the most extensive welfare systems in the developing world'.¹²⁷

One of the most important changes in the system has been the centralisation of social assistance administration. Previously social grants were administered through the provinces. This decentralized approach was found unconstitutional in *Mashavha*.¹²⁸ The restructuring of the system involved transferring the social

RS4, 03-12, ch56D-p20

assistance function to the national government where it is now being administered through the South African Social Security Agency ('SASSA'), an organ of the state. The purpose of the South African Social Security Agency Act is to ensure that national standards are set for the efficient and effective use of the limited resources available to the State for social security.¹²⁹ Provincial social development departments were relieved of the responsibility to finance social security from 1 April 2005. Today, the eligibility criteria, means testing and size of grants are all specified in national welfare regulations.¹³⁰

This section discusses the various policy and legislative instruments that enabled the transition to the current system and that constitute the current legal framework for the provision of social grants.

124 S Liebenberg 'Human Rights and Social Security' (1998) 1(2) *ESR Review* 1. Liebenberg writes that the history of social assistance in South Africa is one of pervasive racial discrimination. Even though South Africans were eligible for the State Maintenance Grant, African women, for example, were effectively excluded from the process. See Sandra Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 12 *SAJHR* 234, 242 (Liebenberg 'Social Assistance'). According to de Villiers, however, the current practices and standards of provinces vary significantly; and the worst of these provincial administrations perpetuate the pre-1994 apartheid social policy. Nick de Villiers 'Social Grants and the Promotion of Administrative Justice Act' (2002) 12 *SAJHR* 320, 321.

125 Liebenberg 'Social Assistance' (supra) at 243.

126 Act 13 of 2004. Chapter 4 of this Act is not yet in effect. Chapter 4 creates an Inspectorate for Social Assistance. The Inspectorate is meant to operate independently from the Minister or the Department of Social Development.

127 Beth Goldblatt 'Gender and Social Assistance in the First Decade of Democracy: A Case Study of South Africa's Child Support Grant' (2005) 32(2) *Politikon* 239.

128 *Mashavha v President of the Republic of South Africa & Others* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC), [2004] ZACC 6.

129 Act 9 of 2004. The date of commencement for this Act was 15 November 2004.

130 GN R 1233 in *Government Gazette* 22852 (23 November 2002) 1.

(a) Statutory framework: White Paper and SASSA

The starting point for understanding the social assistance legislative framework is the White Paper, which identified the following key restructuring priorities:

- (a) Building consensus around a national restructuring of the social policy framework;
- (b) Creating a single national welfare department as well as provincial welfare departments;
- (c) The phasing out of all disparities in social welfare;
- (d) Developing a financially sustainable welfare system ¹³¹

The purpose of the Social Assistance Agency Act is to effect to these priorities and ensure that national standards are set for the effective use of the limited resources available to the state to give content to social security.

The framework created by the Social Assistance Act can be described as a centralized institution with limited autonomy. It makes provision for extensive Ministerial direction and involvement. No provision is made for a Board or supervisory and advisory structure or institution of a representative nature that could assist the Minister of Social Development or supervise or scrutinize the Minister's decisions.

The system is administered by SASSA. ¹³² A creature of statute, SASSA is a juristic person and is intended to be the sole agent that ensures the management, administration and payment of social assistance. It serves as an agent for the payment of social security. Its functions are described in Chapter 3 of the Social Assistance Act and include collecting, collating, maintaining and administering the information necessary for the payment of social security in a national database. The 2008 Social Assistance Amendment Bill enables applicants for social grants to appeal the decisions of SASSA. SASSA is also tasked with establishing a compliance and fraud mechanism to ensure the integrity of the social security system ¹³³

RS4, 03-12, ch56D-p21

As a general rule, social grants are paid subject to a means test. Means testing implies the evaluation, by *the responsible agency, of the income and assets of the person applying for the social grant so as to establish whether the person's means are below a stipulated amount.* The applicable means test varies from one social grant to another. The separate urban and rural income thresholds that existed previously have been removed. ¹³⁴

(b) Basic Income Grant (BIG)

131 Elize Strydom (ed) *Essential Social Security Law* (2nd Edition 2006) ('*Essential*') 22.

132 SASSA was established pursuant to a recommendation by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa of 2002.

133 Social Assistance Act, 2004 s 4.

134 National Treasury *National Budget Review: 2009* (2009) 89 available at <http://www.treasury.gov.za/documents/national%20budget/2009/review/> (accessed on 26 February 2012).

In 2000, Cabinet established a Committee of Inquiry to investigate social security in South Africa. The committee was chaired by Prof Vivienne Taylor and is commonly known as the 'Taylor Commission'. The Taylor Commission came to the conclusion that South Africa's social security system is neither 'comprehensive nor adequate.'¹³⁵ For this reason, the Taylor Commission concluded that the existing social security system cannot adequately address the problem of poverty.¹³⁶ One of the most pressing problems the Commission identified was the position of people excluded from the present formal social security classification.¹³⁷

The Taylor Commission, the Committee of Inquiry into a Comprehensive Social Security System and the South African Human Rights Commission have recommended the implementation of a Basic Income Grant (BIG) to help the poorest of the poor.¹³⁸ Such a grant is to be financed by tax revenue. The introduction of the BIG will assist those persons previously excluded from social security to escape conditions of extreme deprivation.¹³⁹ It is proposed that R100 should be paid per month to everyone in South Africa who does not receive social assistance and who falls through the social safety net.¹⁴⁰ Children who do not, for example, receive another grant such as a Child Care Grant will receive a BIG.¹⁴¹ Sandy Liebenberg has argued that the BIG is the most effective and appropriate measure for fulfilling the right to social security because it fulfills all the requirements of the *Grootboom* reasonableness test.¹⁴² Others have argued that the introduction of BIG will go a long way in alleviating desperate poverty

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because social grants alleviate poverty more effectively than public works.¹⁴³ The Taylor Report indicated that the BIG 'has the potential, more than any other possible

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- 135 Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present — Protecting the Future* (2002) 154, available at www.cdhaarmann.com/Publication/Taylor%20report.pdf (accessed on 26 February 2012).
- 136 It has however been claimed that social grants have played a critical role in reducing poverty. See Michael Appel 'Poverty in South Africa is "Declining"' (2 October 2008) available at www.southafrica.info/about/social/poverty-021008.htm (accessed on 26 February 2012).
- 137 Rene Liffman, Ben Mlalazi, Valerie Moore, Sunday Ogunronbi & Marius Olivier 'Those Who Have and Those Who Don't: An Investigation into the Limited Scope of Application of Social Security in South Africa' (2000) 4(1) *Law, Democracy and Development* 15.
- 138 See Sandra Liebenberg 'The Judicial Enforcement of Social Security Rights in South Africa: Enhancing Accountability for the Basic Needs of the Poor' in Eibe Riedel (ed) *Social Security as a Human Right* (2007) at 5.
- 139 See South African Human Rights Commission *4th Annual Economic and Social Rights Report* (2000-2002) 229.
- 140 See Avinash Govindjee *Social Assistance as a Framework for Social Policy in South Africa* (2009) 132.
- 141 Ibid.
- 142 S Liebenberg 'Universal Access to Social Security Rights: Can a Basic Income Grant Meet the Challenge?' (2002) 3(2) *ESR Review* 10.

social protection intervention, to reduce poverty and promote human development and sustainable livelihoods.' The feeling is that a BIG will at least 'put food on the table.'¹⁴⁴

The South African government has, however, largely ignored the recommendations of the Taylor Commission.¹⁴⁵ President Mbeki was quoted as saying that a single intervention will make no difference to the poor.¹⁴⁶ Instead, he advocated for a comprehensive social security system. There is however still strong lobbying for the introduction of the BIG.

The fact that the South African social security system excludes millions of destitute people from its ambit could found a constitutional challenge based on the right to social security. The Social Assistance Act, 2004 has a limited scope and millions of South Africans fall through the net. Combined with the high rate of unemployment, this makes a constitutional challenge to compel the government to adopt the BIG — or something similar — feasible. The government's continued unwillingness to institute the BIG, despite numerous recommendations and studies indicating how it could be funded, demonstrate that it has acted unreasonably.

(c) Social grants

This section will focus on the most prominent social grants: old-age grants, disability grants and child care grants. There are two common forms of 'social insurance' that I do not address in this section: social security measures for employees who are injured at work as a result of an accident;¹⁴⁷ and social assistance paid to relieve the results of unemployment and the result of sickness during employment.¹⁴⁸

The South African government also pays compensation to individuals who have suffered hardship as the result of having the status of victims of war¹⁴⁹ and persons who have sacrificed their jobs and education in the process of overturning oppressive governments and establishing a democratic government.¹⁵⁰ Since this

143 C Meth 'Finding BIG Political Will' *Mail & Guardian* (August 13 2004) 29.

144 *Ibid.*

145 See the rejection of the BIG by the Finance Minister in the *2004 Budget Speech* (18 February 2004) available at <http://www.info.gov.za/speeches/2004/04021815161001.htm> (accessed on 27 February 2012) ('[T]here were submissions on the idea of a basic income grant. I have sympathy with the underlying intent. Government's approach, however, is to extend social security and income support through targeted measures, and to contribute also to creating work opportunities and investing further in education, training and health services. This is the more balanced strategy for social progress and sustainable development.')

146 Cited in Meth (*supra*) at 29.

147 For more on compensation for occupational injuries see AA Landman 'Employment Injuries' in Strydom (ed) *Essential* (*supra*) 39.

148 For more on compensation as a result of unemployment, see AA Landman 'Unemployment' in Strydom (ed) *Essential* (*supra*) 83.

149 This type of compensation is paid under the Military Pensions Act 84 of 1976.

form of compensation more accurately falls under 'social compensation' than social assistance and since far fewer individuals benefit from these forms of

grants than from child care grants or old-age grants, I will not discuss these forms of compensation any further.¹⁵¹

(i) Old-age grants

Old-age grants form the largest portion of the social security budget. From 1 April 2011 the old-age grant is R1140 per month.¹⁵²

Old-age grants have become increasingly important as a measure to relieve poverty. Social change and growth in the number of poor has reduced the ability of traditional support networks and the extended family to provide a safety net for the elderly. Old-age pensions play a critical role in relieving poverty, in part because pension money circulates widely in many poor communities and helps to sustain not only the elderly themselves, but also their relatives. Grandparents, for example, often carry the responsibility of taking care of children orphaned as a result of AIDS.

Unlike its predecessor, s 10 of the Social Assistance Act, 2004 expressly provides for social grants for the aged. Originally, s 10 drew a sex-based distinction with regard to age of eligibility. Women were eligible for an older person's grant at the age of 60 years, while men had to wait until they turned 65. This age discrepancy was challenged in *Roberts v Minister of Social Development*.¹⁵³ In a somewhat confusing judgment, Mavundla J upheld this gender based distinction. He recalled that women (especially African, Coloured and Indian women) had been particularly disadvantaged by Apartheid. It was, therefore, not unfair discrimination to privilege them by allowing them to claim their old-age grants before men. He also held that it would be inappropriate for a court to interfere by forcing the government to provide benefits to both men and women at the age of 65. He held:

I am of the view that it is the prerogative of the State, to determine its financial resources and the deployment thereof. Outside agencies, and the so called experts, may give an opinion, when requested by the government, as to how to allocate and expend its resources. To elevate such opinions given outside governmental brief, to an authoritative level would be encroaching in the domain of government, and this should not be countenanced by the courts, and I decline to do so.¹⁵⁴

This reasoning ignores the Constitutional Court's willingness in *Khosa* to extend social grants to permanent residents despite government's protestations of a lack of funds. More recently, the Court has held as follows:

150 This compensation is paid in terms of the Special Pensions Act 69 of 1996.

151 For more on this form of compensation see the chapter by Piet Myburgh 'Hardship Caused by the State' in Strydom (ed) *Essential* (supra) at 185.

152 *Increase in Respect of Social Grants* GN R285 in *Government Gazette* 34169 (13 March 2011).

153 *Roberts & Others v Minister of Social Development & Others* TPD Case No 32838/05 ('Roberts') available at <http://www.communitylawcentre.org.za/court-interventions/equalisation-case-of-pensionable-age> (accessed on 10 February 2012).

154 *Ibid* at para 40.

This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not

good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.¹⁵⁵

If Mavundla J had concluded that it was unconstitutional to distinguish between men and women in the allocation of old-age grants, the government's lack of resources should not have been a bar to abolishing that distinction. In any event, in 2008 the Social Assistance Act of 2004 was amended to allow South African men to receive grants at the age of 60.¹⁵⁶

Old-age pensions are subject to a means test. The value of a grant is reduced on a sliding scale basis if a beneficiary receives additional income above a certain amount. People with incomes over R44 880 per year similarly do not qualify for a state pension.¹⁵⁷ The means test also has an asset component: Those persons with assets worth more than R252 000 (in case of a single person) do not qualify for old-age grants.

Van der Berg describes the operation of the means test as follows:

In order to prove eligibility for the receipt of the means test elderly persons who wish to apply for social pensions have to provide a detailed account of all their sources of private income and their assets, and this needs to be confirmed by a person familiar with the applicant. If such income and assets fall below the exclusion level such persons qualify to receive a pension.¹⁵⁸

Determining the income of older persons who are no longer formally employed is, of course, very difficult. Many such older persons are adequately supported by family members or by subsistence farming.¹⁵⁹ Because of these difficulties, the means test is inconsistently applied and is, at times, even unenforceable. As a result, the old-age grant system, as currently conceived, does not effectively target the poorest of the poor.

(ii) Disability grants

The disabled are one of the most vulnerable groups in society.¹⁶⁰ The government's policy for the disabled must do more than recognize their vulnerability and increase their access to grants. It must embrace the disabled as part of mainstream society.

155 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33 at para 74.

156 Social Assistance Amendment Act 6 of 2008.

157 *Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance* GN R898 in *Government Gazette* 31356 (22 August 2008) ('*Social Assistance Regulations*') regulations 2 and 19 read with Annexure A.

158 Servaas Van den Berg *Issues in South African Social Security* (1994) 35.

159 *Ibid* at 249.

The state currently advocates a 'social model of disability'.¹⁶¹ This model characterizes disability as a 'human rights and development issue' and not merely a welfare issue.¹⁶² The key difference is the recognition of the equal worth of people with disabilities as contributing members of society, rather than recipients of social largesse.

Like old-age grants, eligibility for disability grants is related to gender. Section 9 of the Social Assistance Act provides that a man is eligible for a disability grant if he is between 18 to 59 years old, but women are eligible if they are between 18 and 62 years old. Although this discrepancy in ages for men and women appears to be discriminatory, it could be argued on the authority of *Roberts v Minister of Social Development* that the discrimination is not unfair. However, even assuming that *Roberts* was rightly decided, it would seem that different considerations apply to disability grants. Disability is itself a ground of historical discrimination. To deprive some people with disabilities access to grants in order to privilege other people with disabilities, would seem difficult to justify.

A person is only eligible to receive a disability grant if he or she does not receive any other social grant in respect of him or herself. This principle seems mistaken. Although the principle that an individual should not benefit from more than one social grant is generally salient, those who suffer from 'double vulnerability' because of old age and disability should be compensated more generously because they have greater needs. This failure to appreciate the particular needs of people with disabilities may be open to constitutional challenge.

A distinction has to be made between those who receive long-term disability grants — as required by permanently and severely disabled persons living in poverty — and short-term disability grants — as required by persons receiving medical treatment and unable to work during such time.¹⁶³

160 The Constitutional Court makes clear that vulnerability is a critical consideration in determining whether an individual or group has been discriminated against. See *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 49; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 20; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 126; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1235 (CC).

161 See M Olivier, N Smit, ER Kalula & GCZ Mhone *Introduction to Social Security* (2004) 255. This is the model advocated by Office of the Deputy President *White Paper on an Integrated National Disability Strategy* (1997) available at www.disabilitygauteng.org/National%20Disability%20Strategy.pdf (accessed on 14 February 2012) ('*Disability White Paper*').

162 See *Disability White Paper* (supra) at 9 ('An understanding of disability as a human rights and development issue leads to a recognition and acknowledgement that people with disabilities are equal citizens and should therefore enjoy equal rights and responsibilities. This implies that the needs of every individual are of equal importance, and that needs must be made the basis for planning. It further implies that resources must be employed in such a way as to ensure that every individual has equal opportunities for participation in society. In addition to rights, people with disabilities should have equal obligations within society and should be given the support necessary to enable them to exercise their responsibilities. This means that society must raise its expectations of people with disabilities. A human rights and development approach to disability focuses on the removal of barriers to equal participation and the elimination of discrimination based on disability.')

163 The latter should take the form of relief available under other regulations such as illness benefits under the Unemployment Insurance Act 63 of 2001.

To be eligible for a disability grant ¹⁶⁴ one needs to provide proof that the degree of disability is such that it makes the person unable to earn a living and that he or

she does not refuse employment within his or her ability. ¹⁶⁵ Nick de Villiers writes that the vague and abstract criteria used to determine disability often invite 'unfair misapplication'. ¹⁶⁶ So, for example, a 100 per cent blind man was categorized as temporarily disabled because there 'might' be employment for him in a year's time.

¹⁶⁷

A discrepancy exists between those who are entitled to disability grants and those who actually receive them. Given this discrepancy, the state may well be in breach of its FC s 27 duty to ensure the accessibility of grants and other social services to the disabled. ¹⁶⁸ There is, as yet, no legislation specifically designed to protect the rights of persons with disabilities.

The spread of HIV/aids poses further challenges to government in allocating resources for the disabled. ¹⁶⁹ Efforts are currently being made to introduce a chronic illness grant for people with HIV and diseases such as tuberculosis. This move will massively expand the pool of people eligible for disability grants. It would also seem that it would engender the use of disability grants as an imperfect proxy for poverty alleviation.

(iii) Child Care Grants

Since 1998 provincial governments have been financing and delivering three social assistance programmes for children: ¹⁷⁰ the child support grant; the foster care grant; and the care dependency grant. ¹⁷¹

(aa) Child Support Grant ('CSG')

164 See Social Assistance Act, 2004 s 9, read with *Social Assistance Regulations* regulation 3.

165 Elsabe Klinck 'People with Disabilities' in M Olivier, N Smit & E Kalula (eds) *Social Security: A Legal Analysis* (2004) at 327. (Klinck points out that the gross misconceptions with regard to the nature and the extent of many types of disabilities might mean that a person can be objectively fit to find employment but may be unsuccessful in doing so owing to factors unrelated to the stated criterion.) See also Nick de Villiers 'Social Grants and the Promotion of Administrative Justice Act' (2002) 12 *SAJHR* 320, 348 n 23 (De Villiers writes of the 'misconceived forms, misinterpreted tests, misapplied lapses and mass discontinuations' in the context of the entire disability grant system.)

166 De Villiers (*supra*) at 330.

167 *Ibid.*

168 Klinck (*supra*) at 329. General legislation applies to persons with different disabilities with respect to education, employment, the right to marriage, the right to parenthood/family, political rights, access to court-of-law, the right to privacy and property rights. The following benefits are guaranteed by law to persons with disabilities: health and medical care, training, rehabilitation and counselling, financial security, employment and independent living.

169 The Department of Social Development has commissioned a study by M Schneider, G Boyce, C Desmond & J Goudge *Developing a Policy Response to Provide Social Security Benefits to People with Chronic Diseases* (2007).

The CSG is an important poverty-alleviating grant. The primary purpose of the CSG is to provide a regular source of income to caregivers of children living in poverty to assist them to meet the needs of children in their care. The CSG is

currently the state's most extensive and largest social assistance programme in terms of the number of beneficiaries reached.¹⁷²

Since 1 January 2011 the amount of the grant is R270 per month for every child who qualifies. Over the years, the age for eligibility has been raised. In 1998 the cut-off age for eligibility was 6. In 2003/2004, the age of eligibility was raised to 14. On 1 January 2011 the age of eligibility was raised to 17 and on 1 January 2012 the grant was further extended to primary caregivers with children under the age of 18.¹⁷³ Despite these welcome extensions, the amount of R270 remains insufficient to meet 'even the minimum needs of a child'.¹⁷⁴ Grants are often used to finance other household needs, which should be provided by the state, such as school fees, water and electricity.¹⁷⁵

To receive a CSG, two requirements have to be met. First, a person must be the primary caregiver of a child under 18. The caregiver need not be the biological parent of the child — it is sufficient that he or she is the primary person providing for the needs of the child.¹⁷⁶ Second, the applicant must pass the means test based upon personal income. A single caregiver is entitled to a CSG if she earns R2600 or less per month whereas a married couple will be entitled to the grant if they earn R5 200 or less per month. Presently the means test does not take into account the number of people in the household or the number of children being supported by the

170 Judith Streak 'What Benefits will Centralisation of Social Assistance Budgeting and Delivery bring Vulnerable Children?' (2005) *IDASA Budget Brief* No. 159, available at www.idasa.org/media/uploads/outputs/files/Budget%20Brief%20159.pdf (accessed on 26 February 2012).

171 The government introduced the CSG in 1998 as a measure to replace the State Maintenance Grants. The other two grants already existed in 1998. Under apartheid, it had benefited primarily white children. *Ibid.*

172 Aislinn Delany, Zenobia Ismail, Lauren Graham & Yuri Ramkissoo *Review of the Child Support Grant, Uses Implementation and Obstacles* (June 2008) available at www.unicef.org/southafrica/SAF_resources_childsupport.pdf (accessed on 27 February 2012) ('*Review of Child Support Grant*') 1.

173 *Increase in Respect of Social Grants* GN R285 in *Government Gazette* 34169 (31 March 2011).

174 See Beth Goldblatt 'Gender and Social Assistance in the First Decade of Democracy: A Case Study of South Africa's Child Support Grant' (2005) 32(2) *Politikon* 239, 241 (Goldblatt 'Gender')(Goldblatt states that R180 per month (the previous amount of the grant) was not sufficient. It can be argued that in light of the current rate of inflation R270 is also not sufficient).

175 *Ibid* at 241.

176 A primary caregiver may apply for a CSG for any number of his or her biological children. The maximum number of non-biological children for whom a primary caregiver can apply is six.

primary caregiver's income. Interestingly, almost all of the primary caregivers applying for the CSG are women.¹⁷⁷

Liebenberg criticises the especially burdensome conditions imposed on those seeking childcare grants. In her view, conditions such as requiring the applicant to prove that he or she has not 'without good reason' refused employment are unnecessarily onerous.¹⁷⁸ While Liebenberg argues that the Department of Social Development should concentrate on the progressive improvement of the Basic Income Grant, in the interim she notes that the CSG ought to be increased in order to make a genuinely meaningful impact on the lives of impoverished children.¹⁷⁹

Children living separately from their parents should be able to claim social security.¹⁸⁰ This was confirmed in *Centre for Child Law v Minister of Home Affairs* where the court found that unaccompanied foreign children are entitled to social

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services and to accommodation in a place of safety.¹⁸¹ In a subsequent case, *Centre for Child Law and Others v MEC for Education, Gauteng and Others*,¹⁸² the High Court dealt with the position of children who had been removed from their families due to abuse or neglect, and placed in a school of industry. Unfortunately, the children found themselves in equally bad or worse conditions when they were placed in the care of the state. The Court ordered both short-term relief in the form of sleeping bags for the children as well as medium-term relief in the form of the appointment of therapeutic services personnel and a process of quality-assurance process.¹⁸³ It maintained supervision of the case to ensure the state complied with the order. According to Skelton the state should render similar services to needy children who still live with their parents.¹⁸⁴

Beth Goldblatt highlights the predicament of women collecting childcare grants as the primary caregivers. In order to collect these grants, women have to pass a means test. This test means that poor unemployed women, who are often not in a position to feed themselves, have less incentive to seek employment if they are to

177 *Review of Child Support Grant* (supra) at 1.

178 Sandra Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 12 *SAJHR* 234, 246 n 75.

179 Sandra Liebenberg 'Children's Right to Social Security, South Africa's International and Constitutional Obligations' (2001) *Socio-Economic Rights Project*, UWC 1, 2 n 4.

180 See Anne Skelton 'Girl's Socio-Economic Rights in South Africa' (2010) 26 *SAJHR* 141.

181 2005 (6) SA 50 (T).

182 2008 (1) SA 223 (T).

183 For more on this and similar remedies, see Michael Bishop 'Remedies' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 9.6.

184 Skelton (supra) at 158.

collect the grant they need to support their children.¹⁸⁵ Even more troubling is the exclusion of children living in child-headed households from the child support grant programme. Goldblatt rightly contends that the exclusion is unconstitutional because it breaches the rights to equality, social security and children's socio-economic rights.¹⁸⁶

The profound effect of the AIDS epidemic on family life in South Africa cannot be ignored in the debate on child care grants. The Children's Institute has cautioned that 'idealising particular care arrangements or rejecting others outright, inappropriately stereotypes the nature of household forms'.¹⁸⁷ The social security system should be sensitive to the realities of South African family arrangements.

(bb) Foster care grant¹⁸⁸

Foster children are children who are 'in need of care' due to either neglect or abuse.¹⁸⁹ Foster care grants are paid to foster parents in respect of a child who has been removed from parental care due to unfavourable home circumstances.¹⁹⁰ In 2011 the foster care grant was R740 per month. The amount is adjusted almost every

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year. Significantly, the foster care grant is R470 per month more than the CSG.¹⁹¹ This higher amount makes the grant the object of greater abuse. Strictly speaking, the foster care grant is not a means-tested grant: in other words the grant does not depend on the foster parent's income. To be eligible to foster a child a person must be a South African citizen, permanent residents or documented refugees over the age of 18.¹⁹² Interestingly, the Social Assistance Act, 2004 makes provision for temporary assistance for those who are in desperate need of support but who have not yet received their foster grant, in the form of the Social Relief of Distress ('SRD').¹⁹³ SRD can take the form of a food parcel, a voucher or cash.

185 Golblatt 'Gender' (supra) at 242 n65.

186 B Goldblatt & S Liebenberg 'Giving Money to Children: The State's Constitutional Obligation to Provide Child Support Grants to Child Headed Households' (2004) 20 *SAJHR* 151.

187 S Giese, H Meintjes, R Croke & R Chamberlain *Health and Social Services to Address the Needs of Orphans and Other Vulnerable Children in the context of HIV/AIDS in South Africa* (2003) xiv.

188 The Constitutional Court recently considered the procedure for removing children from their parents in order to place them in foster care. *C & Others v Department of Health and Social Development, Gauteng & Others* [2012] ZACC 1 at para 75 ('It can never be in the interests of children for their safety or well-being to be endangered. The removal provisions are aimed precisely at preventing this and ensuring that the interests of the children are positively catered for.')

189 Elize Strydom (ed) *Essential Social Security Law* (2006) ('Essential') 171.

190 *Ibid.*

191 *Increase in Social Grants Regulations* (supra).

192 *Social Assistance Regulations* Regulation 7(c).

(cc) Care Dependency Grant

A care dependency grant puts the responsibility on government to provide social assistance to children whose parents or primary caregivers are unable to support them financially. Care-dependent children need full-time care at home due to severe mental or psychological disability.¹⁹⁴ A grant is paid to the parent or foster parents of a care-dependent child between the ages of one and eighteen years in their care.¹⁹⁵

In the case of this grant, a means test is applied to parents or primary caregivers but not to foster parents. Foster parents may therefore access the grant regardless of how much they earn. From 1 April 2011 the Care Dependency Grant is R1140 per month. To qualify for the grant a single parent or caregiver must earn R11 400 or less per month whereas a married couple may only jointly earn R22 800 or less per month.¹⁹⁶ SRD is also available for those whose grants have been approved and are in desperate need of temporary assistance.

56D.6 International social security standards

There are many reasons why international law must be considered in the context of the right to social security. The Final Constitution recognizes the importance of international law and the place of international law.¹⁹⁷ FC s 232 grants customary international law the force of law in the Republic, unless it is inconsistent with the Final Constitution or an Act of Parliament. FC s 233 states that 'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' And, in terms of FC s 39(1)(b), courts 'must consider international law' when interpreting the Bill of Rights.

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As the *Grootboom* Court noted, international law, including non-binding international instruments, is an important guide to interpreting the rights in the Final Constitution.¹⁹⁸ A treaty can be used as an aid to interpretation even if South Africa has not ratified the relevant treaty, as can official interpretations of the treaty. The Constitutional Court has, for example, regularly relied on General Comments to the

193 Social Assistance Act, 2004 s 13.

194 Strydom *Essential* (supra) at 172.

195 Ibid.

196 *Social Assistance Regulations* Annexure D.

197 For more on international law, see Hennie Strydom & Kevin Hopkins 'International Law' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30.

198 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 at para 26 (The *Grootboom* Court, however, indicated that the weight to be attached to a particular principle would vary. The Court stated that 'where a relevant principle of international law binds South Africa, it may be directly applicable.')

International Covenant on Economic, Social and Cultural Rights ('ICESCR') even though it is only a signatory to the document.¹⁹⁹

Although many international instruments can and should assist in interpreting the right to social security,²⁰⁰ this chapter will focus on the ILO Conventions, the ICESCR and the European Convention on Human Rights. Since the bulk of social grants are paid to children, I also consider the International Convention on the Rights of the Child.

(a) ILO Conventions

The International Labour Organisation ('ILO'), has, since its establishment in 1919, played an important role in developing standards for social security. It has done so through both Conventions and Recommendations.²⁰¹ The ILO Conventions contain the minimum conditions that should be reflected in a country's law once the country has ratified the instrument.²⁰²

The Social Security (Minimum Standards) Convention No 102 ('Convention 102') sets the most comprehensive standard with regard to social security. Convention 102 covers nine social risks. Each part of the Convention provides specific standards aimed at guaranteeing the benefits of social security. An ILO Member State can only ratify Convention 102 after complying with the standards relating to at least three of the nine risks: medical care,²⁰³ sickness benefits,²⁰⁴

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199 See, for example, *Grootboom* (supra) at paras 29-30; *Minister of Health and Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15 at para 26; and *Jaftha v Schoeman & Others, Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC), [2004] ZACC 25 at para 24.

200 The Universal Declaration of Human Rights (1948), for example, which was adopted 'as a common standard of achievement for all peoples and all nations' also recognizes the right to social security and assistance (arts 22-25).

201 Whereas Conventions are binding on ratifying states, recommendations are non-binding instruments which provide guidelines for national policy and action. See L Jansen van Rensburg & MP Olivier 'International and Supra-National Law' in M Olivier, N Smit & E Kalula (eds) *Social Security: A Legal Analysis* (2004) 646.

202 Elize Strydom 'The Role of the International Labour Organisation in Social Security' in Strydom *Essential* (supra). See also L Lamarche 'Social Security as Human Right' in D Brand & R Sage (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2003) 109.

203 Part II arts 7-12.

204 Part III arts 13-18.

unemployment benefits,²⁰⁵ old-age benefits,²⁰⁶ workers' compensation,²⁰⁷ family,²⁰⁸ maternity,²⁰⁹ invalidity,²¹⁰ and survivor's benefits.²¹¹ One of the three schemes chosen must be either an old-age benefit, unemployment benefit, invalidity or survivor's benefit. Convention 102 provided an initial framework and was supplemented by subsequent conventions on specific risks.²¹²

Convention 102 was designed to accommodate, and to provide flexibility for, less developed countries.²¹³ Article 3 of Convention 102 allows a state, in the case of insufficient medical or financial capacity, to ratify the Convention and avail itself temporarily of less stringent conditions concerning the duration of benefits and categories of protected persons.²¹⁴ Although South Africa has not signed or ratified Convention 102, it remains a vital source to determine the minimum social security obligations imposed by international law.

(b) The International Convention on Economic, Social and Cultural Rights ('ICESCR')

South Africa signed the ICESCR on 3 October 1994. It has not yet ratified the Convention. As a result, the ICESCR is not yet binding on South Africa under international law and does not have any direct legal effect under South African domestic law. The act of signing is however not without consequence; under the Vienna Convention on the Law of Treaties, South Africa may not undertake steps designed to flout provisions of the ICESCR, and to refrain from 'acts which would defeat the object and purpose of the treaty.'²¹⁵

205 Part IV arts 19-24.

206 Part V arts 25-30.

207 Part VI arts 31-38.

208 Part VII arts 39-45.

209 Part VIII arts 46-52.

210 Part IX arts 53-58.

211 Part X arts 59-64.

212 See Lamarche (supra) at 113. Convention 102 was subsequently amended by the adoption of a few specific social security conventions including Convention 128 on Invalidity, Old Age and Survivors' Benefit (1967) and Convention 130 on Medical Care and Sickness Benefits (1969).

213 See also article 19(2) of the ILO Constitution which provides that the General Conference of the ILO must have due regard to those countries in which climactic conditions, the imperfect development of industrial organization, or other special circumstances make industrial conditions substantially different. The General Conference will then suggest the modifications which it considers necessary to meet the need of such countries.

214 Ibid.

The wording of many of the provisions in the Bill of Rights closely resembles the provisions of the ICESCR. It is therefore only natural to have recourse to the interpretation offered in respect of the Covenant when interpreting Chapter 2 of the Final Constitution.

Article 9 of the ICESCR 'recognize[s] the right of everyone to social security, including social insurance.' The Covenant also makes explicit provision for social

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security for mothers.²¹⁶ The Committee on Economic Social and Cultural Rights ('the Committee') provided its interpretation of the right to social security in General Comment 19, adopted in 2007.²¹⁷ The General Comment recognizes the central importance of social security as a means to the realization of other socio-economic rights: 'The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights.'²¹⁸

The Committee identified four core elements of the right: (a) the social security system must be *available*;²¹⁹ (b) it must cover the nine *social risks and contingencies* identified in Convention 102;²²⁰ (c) the system must be *adequate* in amount and duration;²²¹ and (d) the system must be *accessible* in terms of coverage, eligibility, affordability participation and physical accessibility.²²² This closely tracks the content that the Committee has given to other rights, such as the right to education.²²³

215 Vienna Convention on the Law of Treaties (1969) 8 ILM 679, art 18. See also *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, reprinted in (1987) 9 *Human Rights Quarterly* 122 ('Limburg Principles'); *General Comment 3 'The Nature of State Parties Obligations'* (Article 2 of the Covenant) (5th Session 1990) UN Doc E/1991/23 ('GC 3'); Jansen van Rensburg & Olivier (supra).

216 ICESCR art 10(2) reads: 'Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.'

217 *General Comment 19 'The Right to Social Security'* (Article 9 of the Convention) (39th Session, 2007) UN Doc E/C.12/GC/19 ('GC 19').

218 GC 19 (supra) at para 1.

219 Ibid at para 11.

220 Ibid at paras 12-21.

221 Ibid at para 22.

222 Ibid at paras 23-27.

223 See Stu Woolman & Michael Bishop 'Education' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 57.

The general principles of the ICESCR are also useful in interpreting the scope of the state's obligations under FC s 27(1)(c). However, they need to be read in light of the growing South African case law on the FC ss 26(2) and 27(2).²²⁴ Article 2 of the ICESCR provides:

Each State Party to the Present Convention undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Convention by all appropriate means, including particularly the adoption of legislative measures.

This article can assist in interpreting the concept of 'progressive realisation'. Like the ILO Convention, the ICESCR also makes provision for the particular circumstances of developing countries. However, this clause should not be interpreted as allowing states to defer indefinitely efforts to ensure the enjoyment of Covenant rights.

Article 3 has particular significance for South Africa:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

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Notwithstanding their level of national wealth, State Parties have to move immediately and quickly as possible towards the realization of economic, social and cultural rights. The speed at which rights will be implemented will depend on the nature of the right. The non-discrimination provisions of the ICESCR, for example, were meant to be implemented immediately. Socio-economic rights may also not be subject to 'deliberate retrogressive measures.'²²⁵

With respect to the proviso — 'to the maximum of its available resources' — the Limburg Principles state that this requirement obliges State Parties to ensure minimum subsistence rights for everyone, regardless of the level of economic development in a given country.²²⁶ That is, when it comes to the use of available resources, the state should give priority to the realization of rights recognized in the Covenant: to do this, the state must assure everyone the satisfaction of subsistence requirements, as well as the provision of essential services.²²⁷

(c) UN Convention on the Rights of the Child

Children's rights are guaranteed through the UN Convention on the Rights of the Child ('CRC') and in the African region through the African Charter on the Rights and

224 See *Grootboom* (supra); *TAC* (supra); *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28. Sandra Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010).

225 GC 3 (supra) at para. 9. The General Comments to the ICESCR have an important impact on the interpretation of the right to social security. Particularly important are General Comments No 1 (1989), No 3 (1990), No 4 (1991), No 5 (1994) and No 6 (1995).

226 The Limburg Principles of 1987 are a commentary on the duties of State Parties to the ICESCR and constitute an example of soft law for the purpose of social security.

227 GC 3 (supra) at para. 13.

Welfare of the Child ('ACRWC').²²⁸ South Africa ratified the CRC on 16 June 1995. According to article 6 of the CRC, State Parties are under an obligation to ensure the survival and development of children to the maximum extent possible. This article gives rise to numerous derivative social security rights, including the right to health care and a standard of living that meets the need for clothing, shelter and education. The fundamental principle of the Convention, captured in art 3, is that all actions concerning children must be in the best interest of the child. In that respect, the CRC is in harmony with FC s 28.²²⁹

For the purposes of social security, the following provisions of the CRC are particularly relevant:

- (i) Article 18 provides that the state should provide appropriate assistance to parents and legal guardians in the performance of their child-rearing duties.²³⁰
- (ii) Article 23 affords disabled children the right to special care and assistance.²³¹

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- (iii) Article 26 provides children with a the right to benefit from social security.²³²
- (iv) Article 27 provides that every child have the right to a standard of living which is adequate to cater for the child's physical, mental, spiritual, moral and social development. Although the primary responsibility lies with the parents it is the duty of the state to assist parents.

As a party to the Convention, South Africa must submit reports to the Committee on the Rights of the Child ('the Child Committee') describing the measures it has adopted to give effect to the rights of the child. South Africa submitted its first report in 1997. In its response, the Child Committee expressed pressing concerns about a

228 The ACRWC does not, however, contain a right to social security for children. The only provision relating to maintenance is art 18(3) which states that no child is to be deprived of maintenance due to the marital circumstances of the parent.

229 For more on the relationship between the CRC and FC s 28, see Adrian Friedman, Angelo Pantazis & Ann Skelton 'Children's Rights' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2009) Chapter 47.

230 CRC art 18(3) reads: 'States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.'

231 CRC art 23(1) reads: 'States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.'

232 CRC art 26 reads:

'(1) States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.'

(2) The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.'

number of social welfare issues.²³³ However, much has changed since 1997, so the analysis of the Child Committee will have to be re-evaluated against the current law and facts.

(d) Africa

The African Charter on Human and People's Rights ('African Charter') only directly recognizes a limited right to social security.²³⁴ However, the African Commission on Human and People's Rights ('African Commission') has held that the right 'can be derived from a joint reading of a number of rights guaranteed under the Charter including (but not limited to) the rights to life, dignity, liberty, work, health, food, protection of the family and the right to the protection of the aged and the disabled.'²³⁵ The African Commission defined the minimum content of this implied right as follows:

Ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education consistent with human life, security and dignity.²³⁶

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(e) SADC

On a Southern African level, there has been significant interest in the development and promotion of social security. Many countries in the region must confront deep levels of poverty, the impact of HIV and AIDS, weak economic conditions and the absence of appropriate institutional frameworks.²³⁷ These problems naturally have an impact on social security.

In recent years, the question of social security has been high on the agenda of the Southern African Development Community ('SADC').²³⁸ Three important SADC documents deal with social security: (a) the Founding Treaty of SADC;²³⁹ (b) the

233 Committee on the Rights of the Child *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Addendum: South Africa* (1999) CRC/C/51/Add.2 (The most pressing concerns articulated in the response were the inadequate prioritisation of budgetary resources to ensure the rights of children, the phasing out of the state maintenance grant, the high incidence of child mortality and the high incidence of drug and substance abuse among youth. The Committee also stressed the importance of South Africa's ratification of the ICESCR. The ratification of the ICESCR and the ILO Convention 102 of 1952 might well assist South Africa in bringing its current social security policies into line with the international standards ratified in these instruments.)

234 African Charter art 18(4) provides that: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.'

235 African Commission *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2010) at para 81.

236 Ibid at para 82(i).

237 B Jordaan, E Kalula & E Strydom (eds) *Understanding Social Security* (2009) ('*Understanding*') 45. The Southern African Development Community was formed in 1980. It consists of a loose alliance of nine Southern African states: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

Charter of Fundamental Social Rights in SADC of 2003 (the 'SADC Charter');²⁴⁰ and (c) the 2007 Code on Social Security ('Code on Social Security').²⁴¹

Of these instruments, the Founding Treaty of SADC forms the main regional basis for the development of social security in SADC countries. The objectives as stipulated in the Treaty include the promotion of both economic and social development and the establishment of common ideals and institutions. Importantly, article 5 of the SADC treaty states that it is an objective of SADC to 'alleviate poverty, enhance the quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration'.

One of the objectives of the SADC Charter is to 'promote the establishment and harmonisation of social security schemes'.²⁴² To meet this objective it contains specific provisions for rights to social security for both workers,²⁴³ and non-workers.²⁴⁴

The Code on Social Security contains aims to further promote social security in the region. It specifically recognizes a right to social security²⁴⁵ and refers back to both the SADC Charter²⁴⁶ and the ILO Convention 102.²⁴⁷ It provides a set of principles and standards and a monitoring framework.²⁴⁸ An innovative feature of the Code is that instead of enforcing standards by following the normal route of international monitoring, the Code introduces a promotional independent

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238 Jordaan, Kalula & Strydom (ed) *Understanding* (supra) at 45.

239 Available at www.chr.up.ac.za/undp/subregional/docs/sadc8.pdf (accessed on 21 February 2012).

240 Available at <http://www.sadc.int/index/browse/page/171> (accessed on 21 February 2012).

241 Available at <http://www.ilo.org/gimi/gess/RessFileDownload.do?ressourceId=10371> (accessed on 24 February 2012).

242 SADC Charter art 1(e).

243 SADC Charter art 10(1) reads: 'Member States shall create an enabling environment so that every worker in the Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits.'

244 SADC Charter art 10(2) reads: 'Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance.'

245 Code on Social Security arts 4-6.

246 Code on Social Security art 4.2.

247 Code on Social Security art 4.3.

248 Jordaan, Kalula & Strydom (ed) *Understanding* (supra) at 51.

committee of experts.²⁴⁹ The Committee is tasked with monitoring compliance with the Code and making recommendations within the relevant SADC structures. The Code emphasizes the importance of solidarity and redistribution²⁵⁰ as key components of a social security system aimed at achieving greater equality between rich and poor. Intriguingly, the Code recognizes that the State is not able, on its own, to fully provide for the social security needs of the SADC populations. It emphasizes the importance of a multi-actor approach²⁵¹ and specifically mentions special contingencies relevant in the SADC region such as political conflict and natural disasters.²⁵²

In spite of the laudable objectives of the SADC system, many questions remain with regard to implementation and enforcement. The virtual suspension of the activities of the SADC Tribunal during the SADC 2010 summit casts serious doubt on the effectiveness of the SADC system.²⁵³

56D.7 Non-Discrimination

It is essential that all those in need should have equal access to social security. In line with international trends, South Africa should develop progressively towards a wider and deeper sense of social obligation.²⁵⁴

At present, social security in South Africa is not all-inclusive²⁵⁵ and shows insufficient respect for the principles of equality and non-discrimination.

In the remainder of this section, I consider a few prominent examples of discrimination in the social security system:

249 Code on Social Security art 21.3.

250 Code on Social Security art 2.2(a).

251 Code on Social Security art 2.2(c).

252 Code on Social Security art 18.

253 Currently only four (of ten) judges have been appointed and the Tribunal does not currently hear cases. Brigitte Weidlich 'SADC Tribunal in limbo' *The Namibian* (11 November 2010).

254 See Helen Bolderson & Deborah Mabbet 'Non-Discriminating Social Policy?' Policy Scenarios for Meeting Needs without Categorization' in Jochen Clasen (ed) *What Future for Social Security? Debates and Reforms in National and Cross-National Perspective* (2001) 53.

255 This is consistent with the objective of 'comprehensive' social security as recommended by Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present — Protecting the Future* (2002) 41 available at www.cdhaarmann.com/Publications/Taylor%20report.pdf (accessed on 26 February 2012)(The Committee explained comprehensive social security as follows: 'Comprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development, Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens.')

First, many of the relevant statutes²⁵⁶ extend social security to those who qualify as an 'employee'. This means that formal employment becomes a requirement for access to social security benefits.²⁵⁷ As a result, a vast proportion of the economically active population is excluded from eligibility for social security. Those who are

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unemployed, self-employed, independent contractors or informally employed are excluded from receiving certain classes of social security benefits.

Basson has argued that excluding certain categories of workers from the social security legislation amounts to indirect discrimination on the basis of race or sex.²⁵⁸ She points out that black women overwhelmingly dominate the domestic worker sector. Excluding domestic workers from certain forms of social security coverage therefore impacts on them disproportionately and could amount to unfair discrimination in terms of FC s 9(3). The position of migrant workers is similarly precarious.²⁵⁹ Since migrant workers are exposed to the same risks as any other worker in South Africa (such as the risk of large scale retrenchments), it can be argued that they should benefit equally from the South African social security system. The portability of social security has thus far received no attention in our constitutional jurisprudence.²⁶⁰

Second, Goldblatt writes that women's access to social security in South Africa requires significant improvement.²⁶¹ She argues that the social security system should better reflect a feminist vision in determining the content of grants affecting women.²⁶² A truly inclusive social security framework should, Goldblatt writes, consider the needs of female non-citizens.²⁶³

Third, in the realm of retirement funds, discrimination on the basis of race is still rife. This was vividly illustrated in *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd.*²⁶⁴ In *Leonard Dingler* black employees were treated differently from white employees. All black employees were paid on a weekly basis

256 See, for example, Compensation for Occupational Injuries and Diseases Act 130 of 1993; Unemployment Insurance Act 63 of 2001.

257 Elize Strydom (ed) *Essential Social Security Law* (2006) ('Essential') 262

258 Anneli Basson 'Discrimination in Social Security Legislation' in Strydom (ed) *Essential* (supra) at 264.

259 See Redson Kapindu 'Social Protection for Malawian Migrants in Johannesburg: Access, Exclusion and Survival Strategies' (2011) 11 *African Human Rights Law Journal* 93.

260 Daleen Millard 'Migration and the Possibility of Social Security Benefits: The Position of Non-citizens in the Southern African Development Community' (2008) 8 *African Human Rights Law Journal* 37.

261 Beth Goldblatt 'The Right To Social Security — Addressing Women's Poverty and Disadvantage' (2009) 25 *SAJHR* 442.

262 *Ibid.*

263 *Ibid.*

while white employees were paid monthly. The company insisted that only monthly-paid employees were permitted to join the staff benefit fund.²⁶⁵ This was a clear example of direct discrimination on the basis of race.

I discussed the former disparity in eligibility of men and women for old-age grants earlier.²⁶⁶ In spite of the fact that men and women can now both claim pensions at the age of 60, research has shown that the take up rate is lower for women than for men.²⁶⁷ Commentators have speculated that this is caused by government officials' discriminatory attitudes towards women.

Fourth, those individuals living with HIV should, arguably, be entitled to a disability grant. According to the current state of the law, however, those HIV

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positive individuals who are unemployed but still fit for work are not eligible for a disability grant.²⁶⁸ The policy of the Department of Social Development is that a person with HIV is only eligible for benefits if he or she has a CD4 count of below 50 or a major opportunistic infection. Although this seems to reflect the Constitutional Court's approach in *Hoffmann*,²⁶⁹ this policy can be said to be discriminatory because it creates a perverse incentive. It could encourage HIV-positive people deliberately not to take their Aids medication in order to stay 'ill enough' to qualify for a disability grant. There is a plausible argument that an unemployed HIV-positive person should be deemed to be unable to support him or herself and should, therefore, receive a disability grant. On this reasoning, the policy will not meet the *Grootboom* reasonableness test since it does not priorities the needs of the poorest of the poor.

264 (1998) 19 *ILJ* 285 (LC).

265 The court concluded that by treating black employees differently from white employees, the company directly discriminated on the basis of race.

266 §56D.4(c)(i) above.

267 Basson (*supra*) at 268.

268 See Aids Law Project *HIV/AIDS and the Law: A Resource Manual* (2nd Edition, 2001).

269 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1235 (CC), [2000] 12 BLLR 1365 (CC), [2000] ZACC 17.