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THE NEED FOR A BASIC INCOME GRANT

Submitted in partial fulfilment of the requirement for the degree LLM in Socio-economic rights

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Chapter 1- Introduction

1. Introduction

In this mini-dissertation I look at the Basic Income Grant as a way to realise the right to social assistance for all who need it, as provided for in section 27(1)(c) of the Constitution of the Republic of South Africa, 1996. I have a broad discussion about poverty and income inequality as well as the gap that persists whereby individuals aged between 18 years and 59 years receive no form of social assistance from the state, and the reason why they do not receive assistance. I also look at section 27(2) of the Constitution of the Republic of South Africa, 1996 and why I believe that it has been used as a scapegoat to avoid the implementation of the Basic Income Grant and I argue that the continued absence of the grant is unconstitutional.

Section 2 of the Constitution states that “the Constitution is the supreme law of South Africa, law and conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

Section 27(1)(c) states that “everyone has the right to have access to social security, including, the appropriate social assistance if they are unable to take care of themselves and their dependants”.

Section 27(2) qualifies the right found in subsection (1)(c) where it says “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the right.¹

The preamble of the Constitution states the goal of establishing “a society based on democratic values, social justice and fundamental human rights” and improving “the quality of life of all citizens...”²

¹ Govindjee *Social assistance as a framework for social policy in South Africa – the constitutional right to have access to social security as a framework for social policy in South Africa: Lessons from India* (2009) 85.

² Govindjee (2009) 86.



Section 38 of the Constitution states that the court can make “appropriate relief” for the infringement of any right entrenched in the Bill of Rights.³

The rights contained in the Bill of Rights are not without limitations. Some sections have internal limitations such as the one found in section 27(2).

1.1. Justification of the study

In the Poverty Trends Report for 2006 to 2015,⁴ Statistics South Africa found that 55.5% of the population, 30.4 million people are living in poverty.⁵ A critical challenge faced by South Africa is the high unemployment that perpetuates the cycle of gross poverty. Our social security system has a big gap, because it does not cover the people who fall into the working age population, 18 and 59 years, who are unemployed.⁶ It is my view that the exclusion of this group of people from being able to access social assistance, is unconstitutional. Therefore, in this study I explore the plausibility of the Basic Income Grant as a way to close the social assistance gap and alleviate poverty in South Africa.

1.2. Research Methodology

The research methodology used in this mini-dissertation will mainly be a theoretical approach to the subject matter and a desktop literature review. I critically analyse legislation, case law, international instruments as well as journal articles that apply to

³ Govindjee (2009) 87.

⁴ Statistics South Africa. 2017. *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015*. Report no. 03-10-06 [Online] available from: <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> (accessed 16 September 2018).

⁵ Lameez Omarjee “More than 50% of SA’s population is living in poverty” 22 August 2017. [Online] Available from: <https://www.fin24.com/Economy/more-than-50-of-sas-population-is-living-in-poverty-20170822> (accessed 16 September 2018)

⁶ Adult individuals who are unemployed because they cannot find or secure permanent employment, have no assistance from the government. They are not assisted by the current social assistance system because they are excluded from being able to access it and they cannot be assisted by the Unemployment Insurance fund because working individuals contribute a part of their salary to the UIF so that when they are unemployed they can receive those contributions back. If you have never had a job, you cannot access the UIF.



socio-economic rights with regard to the right to social security, in particular social assistance.

1.3. Chapter outline

In chapter 2 I look at the social security system of South Africa. I then discuss social assistance and the fact that not everyone who needs it and qualifies for it receives it. Lastly, I look at income inequality and the gains that have been made (if any) as well as identifying the gap. I conclude that, with all the gains made with social security in the form of social assistance grants, there is a gap in our system. There is no assistance for individuals aged between 18 to 59 years, who are unemployed and have never had formal employment. I conclude that the Basic Income Grant would resolve this problem.

In chapter 3 I discuss all the applicable law from the international law, regional to the national law of South Africa. I also look at how international law is incorporated into the domestic law and the extent thereof. I conclude that there is law that promotes assisting those individuals who cannot support themselves and their dependents, with social assistance. I conclude that the continued fight against the Basic Income Grant is futile because the existing measures are not working, we still have the massive gap.

Chapter 4 is solely dedicated to a discussion of the Basic Income Grant and what it would take to implement it. I look at the historical background of the grant in the South African context as well as the argument “for and against” the implementation of the grant. I conclude that the only way forward is the introduction of the Basic Income Grant because it will work in conjunction with the Extended Public Works Programme’s (EPWPs) to assist South Africans. I acknowledge that there are limitations to my mini-dissertation such as how the Basic Income Grant will be funded.

Chapter 5 looks at socio-economic rights adjudication in South Africa. It deals with the different roles players, such as organs of state and the judiciary and their duties, when it comes to realising socio-economic rights for South Africans. Lastly, I discuss the *Grootboom* case and the importance thereof. And I conclude that a case can be made for the Basic Income Grant in South Africa.



In chapter 6 I make my conclusion that social assistance is a constitutionally entrenched right for all who need it. One way we can realise this right is to introduce a Basic Income Grant. The continual deflection away from providing social assistance to those who need it is unconstitutional.



Chapter 2 - Social Security in South Africa

2. Introduction

“It is no longer possible to discuss any issue without first asking what its contribution will be to diminishing the extent and depth of deprivation now suffered by half our population. This is not a marginal problem, affecting an unfortunate few. It is a major and debilitating scar on the face of our country. It is the cause of a minute-by-minute suffering for millions of people, including ten million children. None of us can afford an attitude of complacency. Nor can we assume that a continuation of conventional methods to stimulate economic growth and redistribute its fruits will yield results on the scale that is needed. We have to consider radical solutions – and soon.” – Archbishop Njongonkulu Ndungane⁷

This chapter shall look briefly at the social security system in South Africa– with a particular focus on social assistance and the fact that not everyone who requires social assistance is indeed assisted in our country. The purpose of this chapter is to look at the nature of income inequality, the gains made and identifying the gap that remains.

2.1. Overview of the social security system in South Africa

A critical challenge faced by South Africa is the high unemployment that perpetuates the cycle of gross poverty. Poverty has almost become one of our defining attributes even though South Africa is characterised as an upper middle income country.⁸ Our social security system has a gap, it does not cover the people who fall into working age population, those aged between 18 and 59 years, who are unemployed and have never been employed.⁹ June Sinclair echoes this in her paper where she describes

⁷ Ndungane ‘Preface’ in Standing & Samson (eds) *A basic income grant for South Africa* (2003) vi.

⁸ See The World Bank “Upper middle income”. [Online] Available from: <https://data.worldbank.org/income-level/upper-middle-income> (accessed 27 10 2018)

⁹ Sinclair “Poverty: Giving meaning to the right to social assistance” 2012 *STELL LR* 193; S Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 2001 *SAJHR* 232-257; Bundy *Poverty in South Africa Past and Present* (2016) 124.



this group as the “adult poor who are able-bodied but cannot find employment”.¹⁰ She goes into even more detail by stating:

“Many of them work, but their work is unpaid work, disproportionately women’s work, invisible work, the work of the caregiver. Some have intermittent, poorly paid, part-time work and no job security or conventional benefits. Some move in and out of such employment. Many have never had formal employment and have little prospect of finding any before they reach the age of 60 and qualify for the older persons grant. These ‘non-workers’ are not eligible for unemployment insurance because it is premised on contributions and they do not meet the requirements of the Unemployment Insurance Fund (‘UIF’).”¹¹

It is my view that this group of people is unfairly excluded from accessing social assistance, said differently – they are barred from accessing social assistance and this bar is unconstitutional.¹²

Much has been achieved since 1994, but we still have more to do, if we want to achieve the goals set out in the Constitution and have everyone enjoy a fair and decent life. Understandably, not everyone is going to be rich, but we should have a threshold and make sure no one falls below it.

It is unfortunate that at the advent of democracy those that were privileged enough to be above the poverty line stayed above it and those who were under the poverty line because they were systematically oppressed and disenfranchised, remained under the poverty line.¹³

National Poverty Line

¹⁰ Sinclair “Poverty: Giving meaning to the right to social assistance” 2012 *STELL LR* 193.

¹¹ Sinclair “Poverty: Giving meaning to the right to social assistance” 2012 *STELL LR* 193.

¹² Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 2001 *SAJHR* 232-257

¹³ Michelman stated that “poverty is inequality”. Michelman F ‘The Supreme Court, 1968 Term – Foreword: on protecting the poor through the fourteenth Amendment’ (1969) 83 *Harvard Law review* 7. Despite dating from 1969 and the US, the relevance of this phrase is illustrated for example by the poverty/inequality debate with respect to schools in South Africa.



In order to properly address the question of poverty in South Africa I need to illustrate how it is measured. South Africa has three poverty lines that represent the different degrees of poverty.¹⁴ They measure absolute poverty¹⁵ and people found under any of the three are considered impoverished.¹⁶ They measure the total cost of living. The lower-bound poverty line is the preferred threshold in policy-making and monitoring¹⁷

Table 1: 2018 & 2015 inflation-adjusted national poverty lines (per person per month in Rands) are¹⁸

Poverty line	2018 line values	2015 line values
Food poverty line (FPL) ¹⁹	547	441
Lower-bound poverty line (LBPL) ²⁰	785	647

¹⁴ Kate Wilkinson “FACTSHEET: South Africa’s official poverty numbers” 15 Feb 2018. [Online] Available from: <https://africacheck.org/factsheets/factsheet-south-africas-official-poverty-numbers/> (accessed 8 11 2018)

¹⁵ Absolute poverty refers to a specific income threshold that if you find yourself below it, it means that you can’t meet basic needs.

¹⁶ Nechama Brodie “FACTSHEET: What is Poverty?” 12 March 2014. [Online] Available from: <https://africacheck.org/factsheets/factsheet-what-is-poverty/> (accessed 8 11 2018)

¹⁷ Nechama Brodie “FACTSHEET: What is Poverty?” 12 March 2014. [Online] Available from: <https://africacheck.org/factsheets/factsheet-what-is-poverty/> (accessed 8 11 2018)

¹⁸ Table 1: Inflation-adjusted national poverty lines for 2018, Statistics South Africa 3. [Online] Available from: <http://www.statssa.gov.za/publications/P03101/P031012018.pdf> (accessed 5 11 2018).poverty

¹⁹ ‘Food Poverty line – R547 (in April 2018 prices) per person per month. This refers to the amount of money that an individual will need to afford the minimum required daily energy intake of 2100 calories per day. It is commonly known as the “extreme” poverty line.’ [Online] Available from <http://www.statssa.gov.za/publications/P03101/P031012018.pdf> ; individuals living below this poverty line are living in extreme poverty. In 2015, 25.2% (13,8 million) South Africans were living under this poverty line. <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf#page=20> (accessed 8 11 2018)

²⁰ ‘Lower-bound poverty line – R785 (in April 2018 prices) per person per month. This refers to the food poverty line plus the average amount derived from non-food items of households whose total expenditure is equal to the food poverty line.’ [Online] Available from: <http://www.statssa.gov.za/publications/P03101/P031012018.pdf>; in 2015, 40% (21,9 million) people were living under this poverty line. <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf#page=20> (accessed 8 11 2018)



Upper-bound poverty line (UBPL) ²¹	1 183	992
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The fact that we still have people who have remained under the poverty line is unacceptable.

Table 2: Number of people living in poverty in SA by population group in 2015²²

Population group	Number	% of population group
African/Black	28,267,530	64.2%
Coloured	1,989,304	41.3%
Indian/Asian	79,460	5.9%
White	47,494	1%
South Africa	30,383,788	55.5%

The Eastern Cape had the highest share of impoverished residents at 72.9%. Women are worse off than men. 9 out of every 10 poor people is black. And 66.8% of children live in poverty.²³

²¹ 'Upper-bound poverty line – R1 183 (in April 2018 prices) per person per month. This refers to the food poverty line plus the average amount derived from non-food items of households whose food expenditure is equal to the food poverty line.' [Online] Available from: <http://www.statssa.gov.za/publications/P03101/P031012018.pdf>; In 2015, 55.5% (30,4 million) people were living under this poverty line. <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf#page=20> (accessed 8 11 2018)

²² See [Online] Available from: <https://africacheck.org/factsheets/factsheet-south-africas-official-poverty-numbers/> (accessed 8 11 2018)

²³ See [Online] Available from: <https://africacheck.org/factsheets/factsheet-south-africas-official-poverty-numbers/> (accessed 8 11 2018)



South Africa has one of the most unequal societies in the world.²⁴ In 2014, South Africa was ranked the highest, with 63 on the Gini index according to the World Bank.²⁵ South Africa is characterised by its extremely high levels of poverty and unemployment.

In order to put the impact of poverty and unemployment on the population into perspective, I need to include the statistics in this mini-dissertation.

Population Statistics

The population of South Africa amounts to 57.7 million (exact amount being 57 725 600) according to 2018 mid-year estimates.²⁶ The Poverty Trends Report for 2006 to 2015²⁷ by Statistics South Africa found that 55.5% of the population, 30.4 million people are living in poverty.²⁸

The official unemployment rate in Quarter 3 of 2018 is 27,5%. The expanded unemployment rate (which includes discouraged work-seekers) is 37,3%.²⁹ This

²⁴ The Gini index measures financial inequality. It looks at how the nation's income and wealth is distributed amongst its people. Zero (0) being complete equality and one hundred (100) meaning total inequality. [Online] Available from: <https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worlds-most-unequal-countries> (accessed 10 10 2018).

²⁵ The World Bank. [Online] Available from: <http://databank.worldbank.org/data/reports.aspx?source=2&series=SI.POV.GINI&country=#> (accessed 10 10 2018).

²⁶ Statistics South Africa. 2018. *Mid-year population estimates – 2018*. Statistical Release P0302. 23 July. [Online] Available from: <http://www.statssa.gov.za/publications/P0302/P03022018.pdf>. (accessed 8 11 2018)

²⁷ Statistics South Africa. 2017. *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015*. Report no. 03-10-06 [Online] Available from: <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> (accessed 3 October 2018)

²⁸ Lameez Omarjee "More than 50% of SA's population is living in poverty" 22 August 2017. [Online] Available from: <https://www.fin24.com/Economy/more-than-50-of-sas-population-is-living-in-poverty-20170822> (accessed 16 09 2018).

²⁹ Statistics South Africa. 2018. *Quarterly Labour Force Survey – 2018*. Statistical Release P0211. 30 October. [Online] Available from: <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2018.pdf> > (accessed on 20 10 2018).



means that 21.5 million (exact amount being 21 531 648,8) are unemployed. This number does not include the working poor.

Table 3: Rising unemployment rate, 1994 – 2015³⁰

	Labour force	Employed	Unemployed
On official/narrow count			
1994	11,386,000	8,896,000	2,489,000 (22%)
2014	20,122,000	15,055,000	5,067,000 (25%)
2017	22,050,000	16,170,000	5,880,000 (26.7%)
On broad/'expanded' count (this definition includes discouraged work seekers)			
1994	11,386,000	8,896,000	4,707,000 (35%)
2014	20,122,000	15,055,000	8,157,000 (35%)
2017	22,050,000	16,170,000	16,147,950 (36.3%)

South Africa's unemployment rate stands at 26.7%. In the third quarter of 2017, it was at 27.7%, the highest rate in 13 years. The number of unemployed rose to 6.21 million. The expanded definition of unemployment at that time, which includes people who have stopped looking for work, rose to 36.8 percent in the third quarter of 2017.³¹

³⁰ Bundy (2016) 141.

³¹ Trade economics "Unemployment rate" [Online] Available from: <https://tradingeconomics.com/south-africa/unemployment-rate> [accessed on 2 September 2018].



The Quarterly Labour Force Survey for Quarter 3 of 2018³² shows the percentage of unemployed by looking at their level of education.³³ In the third quarter of 2018, the number of unemployed people with less than a matric was 56.1%; the number of unemployed people with a matric was 35,1%; the number of unemployed people with 'other tertiary' level was 6,6%; the number of unemployed people who are graduates was 1,7% and the number of unemployed people falling outside of these categories was 0.6%.

We can see by these stats individuals who did not make it to matriculation make up the highest of the unemployed individuals. And the ones with only a matric make up the second largest percentage of the unemployed.

The 1994, democratically elected government of South Africa inherited an unusually pro-poor welfare system which targeted specific categories of people dubbed the "deserving impoverished", namely the old/ very young (who cannot work due to age) and the disabled.³⁴ Despite this, there were still disparities in how the welfare system worked.

The majority population still remained poor because of lack of access to resources such as property and adequate employment, and the people who did receive a benefit, received the smallest fraction when compared to what the minority received. This was because all socio-economic benefits were regulated by statute on a racially discriminatory basis.³⁵

When the Constitution of South Africa was being drafted, the elected representatives agreed (after it being a major issue of debate to even include them³⁶) that everybody

³² Statistics South Africa. 2018. *Quarterly Labour Force Survey – 2018*. Statistical Release P0211. 30 October. [Online] Available from: <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2018.pdf> (accessed 17 October 2018)

³³ Statistics South Africa. 2018. *Quarterly Labour Force Survey – 2018*. Statistical Release P0211. 30 October. [Online] Available from: <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2018.pdf> (accessed 17 October 2018)

³⁴ Seekings & Matisonn 'The continuing politics of basic income in South Africa' CSSR Working Paper No.286 November 2010.

³⁵ Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 4.

³⁶ South African Journal on Human Rights volume 10 1994.



in South Africa has the right to socio-economic justice and should have, among other socio-economic rights, access to social security and assistance in order to ensure that their needs are met. It was an important part of the new narrative that social security and assistance was not seen as a charity but as a right,³⁷ enforceable against the state.

2.2. The need for reform

The South African domestic economy is not functioning effectively in terms of job creation³⁸ meaning that the government cannot rely on the economic growth process alone to reduce national poverty levels. Due to the correlation between poverty and extreme levels of unemployment in the economy, the state needs to intervene more than it has.³⁹

South Africans aged between 18 years to 59 years old are the hardest hit by the unemployment problem. This is because they are excluded from benefitting (directly or indirectly) from the existing social security safety nets. They qualify and have a right to social assistance in terms of the Constitution,⁴⁰ but are excluded in the legislation.⁴¹ This exclusion was purposefully made by the legislature. In drafting the Act, the legislature was led by the assumption that - because people between the ages of 18 and 59 years are of the working age, they will find employment and be active members of the economy.⁴² This notion is far from the lived experience.

The Basic Income Grant is a way that South Africa can assist its unemployed citizens while working towards attaining full employment as envisioned. South Africa does not

³⁷ Khoza *Socio-economic rights in South Africa* (2007) 380.

³⁸ Borat 'A universal income scheme grant for South Africa: An empirical assessment' in Standing and Samson (eds) *A basic income grant for South Africa* (2003) 77.

³⁹ Standing, Samson & Borat (2003) 77.

⁴⁰ Section 27(1)(c) of the Constitution of the Republic of South Africa, 1996.

⁴¹ Social Security Act 13 of 2004.

⁴² The preamble of the Act starts with the provisions of section 27(1)(c) of the Constitution, yet when social assistance is defined in section 1 of the Social Security Act, it only lists the category of grants that are offered, and if you do not fit into one of those categories, you cannot claim social assistance.



have enough jobs and never will, in the current economic state. The purpose of this mini-dissertation is to show that South Africa needs to implement the Basic Income Grant for all, as a constitutional imperative.

South Africa has an extremely high crime rate, which is increasing at an alarming rate. This is due to the high poverty rate and unemployment.⁴³ The youth is the most affected by the high unemployment, so it should not come as a surprise that we have such extreme high crime rates. Impoverished South Africans turn to crime for greener pastures.

Social assistance, in the form of non-universal, needs-specific grants, is made possible by the Social Assistance Act 13 of 2004. The grant is given to the following categories of people: children from birth until they reach the age of 18 years;⁴⁴ elderly people only when they reach the age of 60 years;⁴⁵ children in foster care;⁴⁶ children with a disability⁴⁷ and persons with a disability;⁴⁸ war veterans;⁴⁹ receivers of grant-in-aid⁵⁰ and of social relief of distress.⁵¹

If the person loses employment, by retrenchment, the Unemployment Insurance Fund will pay out for a couple of months. This is a temporary measure of relief until such

⁴³ Trade economics “Unemployment rate” [Online] Available from: <https://tradingeconomics.com/south-africa/unemployment-rate> [accessed on 2 September 2018].

⁴⁴The child support grant, is given to the eligible primary caregiver of the child. Namely the parents of that child. Section 6.

⁴⁵ Older persons grant, section 10.

⁴⁶ Foster care grant, given to the foster parent to take care of the child. Section 8.

⁴⁷ Care dependency grant, given to the parent or care giver of a child with a disability. Section 7.

⁴⁸ Disability grant, given to a person over 18 who has physical or mental disability that makes it impossible for this person to get work. Section 9.

⁴⁹ People who were in the military and war, who are over the age of 60 years. Section 11.

⁵⁰ Grant-in-aid, is for people who have a mental or physical condition that requires that they have to be regularly attended by another person. Section 12.

⁵¹ Social relief of distress, this grant is given to people affected by a disaster or when the breadwinner is unable to work due to being admitted into an institution or has died. Section 13.



person secures another job. If that person cannot secure another job and their UIF comes to an end, such a person will be without income.

South Africa has a group of people that qualify for social assistance in terms of the Constitution, but are excluded from benefitting from grants by the enacted legislation. South Africa has never had universal employment, even before 1994. The unemployment rate has always been significantly high, especially for the African⁵² and Coloured communities,⁵³ more so for the Africans as they make up more than 80% of the population.⁵⁴

Table 4: The 2017 mid-year population estimates for South Africa by population group read as follows:⁵⁵

Black Africans	80,8% (percent)	45 656 400 (million)
Coloureds	8,8% (percent)	4 962 900 (million)
Indians/Asians	2,5% (percent)	1 409 100 (million)
Whites	8% (percent)	4 493 500 (million)

⁵² See [Online] Available from: <<https://collinsdictionary.com/dictionary/English/african>> (accessed on 25 October 2018)

‘African is a native, inhabitant, or citizen of any of the countries of Africa.’

⁵³ See [Online] Available from: <https://www.britannica.com/topic/Coloured> (accessed 25 October 2018)

‘Coloured, formerly Cape Coloured refers to persons of mixed European (“white”) and African (“black”) or Asian ancestry, as officially defined by the South African government from 1950 to 1991. Individuals assigned to this classification originated primarily from the 18th to 19th century unions between men of higher and women of lower social groups: for instance, between white men and slave women or between slave men and *Khoekhoe* or San women. The slaves were from Madagascar, the Malayan archipelago, Sri Lanka and India. In the 20th century South Africa, the word “coloured” was a social category rather than a legal designation and typically indicated a status intermediate between those who were identified as “white” and those who were identified as “black.”’

⁵⁴ See [Online] Available from: <<https://www.statssa.gov.za/publications/P0302/P03022017.pdf>> (accessed 25 10 2018)

⁵⁵ See [Online] Available from: <<https://www.statssa.gov.za/publications/P0302/P03022017.pdf>> (accessed 25 10 2018)



The government and other political parties acknowledge this fact, as job creation is always mentioned in their respective manifestos.⁵⁶ Yet until those jobs are created, able-bodied people aged between 18 and 59 years will remain unassisted. Poverty in South Africa is not natural phenomenon, it is the by-product of centuries of marginalisation and decades of policies and actions aimed at disenfranchising the majority and self-preserving the minority. Thomas Ross illustrates this point looking at the United States Supreme Court and the opinions that have come out of that court.⁵⁷ He notes the following rhetoric: “Poor people are different from us. Most of them are morally weak and undeserving. And, in any event, we are helpless to solve the complex and daunting problem of poverty. This is the rhetoric of poverty.”⁵⁸ He continues to note that “poor people, it is said or implied, are unwilling to work and especially likely to commit fraud or child abuse, or violate other legal and moral norms”.⁵⁹

This “rhetoric of poverty” seems to transcend into our society as well. We treat the impoverished with impunity, as if they chose to be poor. The only ones deserving of our assistance are children and the elderly, due to their age. While the able-bodied individuals of working age, do not deserve assistance because “they should be working”. We divorce the issues of “unemployment” and “the country not having enough jobs” from each other. As if people are consciously choosing to not be employed.

Klare states that:

⁵⁶ African National Congress’ 2014 Election Manifesto 11 January 2014.

“The ANC is committed to building a democratic developmental state able to lead efforts to overcome unemployment and poverty and reduce inequality. The developmental state will play a strategic guiding role in the economy, and decisively intervene in the interests of the people, particularly the workers and the poor. The state, in partnership with the private sector, organised labour and civil society, must create the conditions to accelerate economic growth and stimulate job creation.”

⁵⁷ Thomas Ross “The Rhetoric of Poverty: Their Immorality, Our Helplessness” (1991) 79 Geo. L.J 1499.

⁵⁸ Ross (1991) 1499.

⁵⁹ Ross (1991) 1499.



*“The poor are denied agency and self-determination in daily life and in their life-course. Poverty is associated with stigma and shame. The poor, particularly the women, are disproportionately vulnerable to violence”.*⁶⁰

2.3. Structure of social assistance in South Africa

As it stands, there is no social assistance for unemployed people aged 18 to 59 years old in South Africa. Social assistance as a constitutionally entrenched right, does not reach all intended targets, which include the unemployed adults aged 18-59 years who are completely excluded. This gap is what this research will focus on.

Table 6: Social Security System in South Africa

SOUTH AFRICA’S SOCIAL SECURITY SYSTEM		
PILLAR 1	PILLAR 2	PILLAR 3
Social Assistance (Non-contributory poverty alleviation)	Social Insurance (Contributory Mandatory)	Voluntary (supplementary) Arrangements
Old Age	Unemployment Insurance Fund (UIF)	Pension and Provident Funds
Disability	Compensation Funds	Retirement Annuities
Child Support	Road Accident Fund	Group Life Schemes

⁶⁰ Liebenberg & Quinot *Law and poverty. Perspectives from South Africa and beyond* (2012) 425.



Foster Child Grant	* National Health Insurance (NHI) ⁶¹	Collective Investment Funds; Long-term savings and endowment funds and other discretionary savings and insurance products
Care Dependency	* National Social Security Fund (NSSF)	
War Veterans		
Social Relief of Distress		

The Department of Social Development, on 14 – 15 March 2017, held a discussion on the Recommendations of the Inter-Departmental Task Team on Social Security and Retirement Reform, regarding Comprehensive Social Security in South Africa.

The task team stated that one of the gaps in the current social security system is that social assistance does not reach all the intended targets, which include unemployed adults aged 18-59 years. One of the key reform recommendations is “expanding social assistance” to include universal coverage and extending social grants to those currently excluded.

With all that said, the main focus of the discussion (and the direction of the department), was the fact that approximately 6.2 million salaried adults do not have retirement financial products. The government wants to establish a government sponsored National Social Security Fund for retirement.

This leaves the people who already remain excluded from the social security system, still excluded. There is a huge disjuncture and disparity in interpreting the Bill of Rights, when as a society, we purposefully let people be excluded from any means of help.



Unemployed people aged between 18 and 59 years cannot secure jobs because there are not enough jobs and they cannot access social assistance because they are excluded by the enacted legislation.

It is no wonder that South Africa has such a high crime rate⁶² and gender based violence. The ablest and most energetic members of the population are not being utilised. So their energy is channelled into less savoury activity. They are expected to start from zero (or stay at zero) and still be upstanding citizens.

The introduction of a Basic Income Grant will result in the excluded people having the power to determine their path in life and they will be less susceptible to external pressures such as crime and also relying on others to provide.

2.4. Historical background of poverty in South Africa

It is not possible to understand South Africa's current poverty without looking at where it originates from. It has developed over time and it manages to adapt with its ever changing character.

South Africa today reflects the traces of poverty caused by colonial dispossession; forced labour by systemic segregation; and by a capitalist system which is characterised by its reliance on cheap, right-less black labour. By 1948, South African society was already defined by high levels of poverty and inequality patterned by race. Apartheid intensified these features, tightening controls over the black majority and deepening white privileges. South African Capitalism in the 20th century was 'a prototypical example of inequality-perpetuating growth'.⁶³

Colin Bundy⁶⁴ looks at the question of "white poverty" at a particular point in time and the steps taken to improve and ultimately eliminate what he calls "the phenomenon".⁶⁵

⁶² Staff Writer "South Africa crime stats 2018: everything you need to know" 11 September 2018. [Online] Available from: <<https://businesstech.co.za/news/government/270689/south-africa-crime-stats-2018-everything-you-need-to-know/>> (accessed 8 11 2018).

⁶³ Leibbrandt "Trends in South African income distribution and poverty since the fall of apartheid" 2010 OECD Publishing 21.

⁶⁴ Bundy *Poverty in South Africa past and present* (2016) 40.

⁶⁵ Bundy (2016) 40.



He states that a study of the “Poor White question” and its dramatically effective solution is noteworthy in two main respects.⁶⁶ Firstly, it is a case study of poverty as susceptible to policy interventions which could be used when it comes to poverty reduction today.⁶⁷ Secondly, some of the ways in which the problem was addressed by politicians in the early decades of the 20th century had direct, profound and lasting implications for black poverty.⁶⁸

In the late 20th century, the political economy of apartheid changed: growth stalled, income of black urban ‘insiders’ rose, and there was a fundamental shift from labour shortage to labour surplus.⁶⁹ The structural poverty of mass unemployment was a direct outcome. Poverty in South Africa today is not a natural or given condition. It is the direct outcome of the history, i.e. the result of deliberate policy, the outcome of neglect and the unintended consequence of social and economic changes.⁷⁰

The ANC government inherited a society in which 58% of all South Africans and 68% of Africans lived in poverty.⁷¹ It also inherited a working age population in which nearly 1 in 5 (narrow definition of unemployment) or nearly 1 in 3 (broad definition of unemployment) was jobless.⁷²

South Africa as a whole has failed its people by not addressing structural unemployment. Economic growth has not been fast enough to create jobs to increase participation rates in the labour market.

South Africa has both an “unemployment problem” and an “employment problem”. Roughly 20% of South African workers live in households that are not able to meet their basic minimum food and non-food requirements. So while ‘unemployment is the

⁶⁶ Bundy (2016) 40.

⁶⁷ Bundy (2016) 40.

⁶⁸ Bundy (2016) 40.

⁶⁹ Bundy (2016) 40.

⁷⁰ Bundy (2016) 134.

⁷¹ Bundy (2016) 134.

⁷² Bundy (2016) 134.



main concern for about half of the poor population, on the other hand low earnings or the poor quality of work is the concern for the other half'. These people are the 'working poor' and according to a recent study, there are 5.5 million of them. In 2014 there were some 13.1 million employees in the labour market of which half earned less than R3 224 per month. Farmers and domestic workers earn the least, with a median wage of R1577 and R2253 respectively.⁷³

According to Colin Bundy⁷⁴ the social security net in South Africa is inefficient despite the fact that it has a wide range. He goes on to state that:

*"Very large numbers of people without resources receive no social assistance at all. This is because the South African welfare system, as it developed from the 1930s, and as it was de-racialised in the 1980s and 1990s, was (modelled from) the social welfare in Britain, New Zealand and Australia. And like those models, it rested on certain mid-20th-century assumptions that included: that most people of working age would be able to find jobs; that people in work would insure themselves against short-term unemployment through contributions; and that working people would help provide for their retirement through contributory pension schemes. Obviously, since 1994 none of these conditions have been met."*⁷⁵

According to Bundy, the social security net of the classic Anglo-Saxon liberal model is not intended to provide for long-term unemployed and in South Africa, the long-term unemployed have received virtually no financial support from the state or private schemes.⁷⁶

⁷³ Bundy (2016) 142.

⁷⁴ Bundy (2016) 124.

⁷⁵ Bundy (2016) 124-125.

⁷⁶ Bundy (2016) 124-125.



“One in three South Africans of working age is unemployed, and they are overwhelmingly African and coloured men in their 20s and 30s, who have never had a full-time job.”⁷⁷

In many households it is the disabled, the sick, children and the elderly who generate income, and not young men and women in the prime of their lives.⁷⁸

2.5. Conclusion

In this chapter I have illustrated the overview of poverty in South Africa. In the next chapter I discuss the laws governing socio-economic rights.

⁷⁷ Bundy (2016) 125.

⁷⁸ Erik Bahre, “Liberation and redistribution: social grants, commercial insurance and religious riches in South Africa”, *Comparative studies in society and history*, 53, 2 (2011), pp. 381-2



Chapter 3 - International, Regional and National Law

3. Introduction

In this chapter I look at the law applicable to the right to social assistance. I look at the international law, regional law and the national law of South Africa. It also look at how the international law is incorporated into the domestic law and the extent thereof. Using the law, I argue that the failure to provide for the able-bodied adults between the ages of 18 and 60 years is unconstitutional.

When Nelson Mandela was democratically elected as the President of the country, South Africa was given its seat back in the United Nations General Assembly.⁷⁹ As a result of this, the country's full membership in the specialized agencies of the United Nations, was restored.⁸⁰

3.1. Relationship between international law and domestic law

"When interpreting the Bill of Rights, a court... must consider international law."⁸¹

Section 39(1) of the Constitution of the republic of South Africa, 1996 demands that we utilise international law when interpreting our rights in the Bill of Rights.⁸² According to Liebenberg,⁸³ section 39 "signals the Constitution's openness and receptiveness to the norms and values of the international community". Section 39(1)(b) is important for interpretation purposes, as it guides us as to 'how' to interpret a specific provision. It does not, however, mean that we are bound to follow the international law. That is

⁷⁹ Dugard *International Law. A South African Perspective* (2012) 20.

⁸⁰ Dugard (2012) 20. Membership in agencies such as the International Labour Organisation (ILO); World Health Organisation (WHO); and the Civil Aviation Organisation (CAO), from which it was excluded from during the apartheid years.

⁸¹ Section 39(1)(b)-(c) of the Constitution of the Republic of South Africa, 1996

⁸² Currie & De Waal *The Bill of Rights Handbook* (2013) 146.

⁸³ Liebenberg *Socio-Economic Rights adjudication under transformative constitution* (2010) 101.



why our courts have developed a “flexible approach”, to sources used to assist in interpreting the Bill of Rights.⁸⁴

It is important that we do not isolate ourselves from the international community, we need to learn from each other and move forward in a progressive and people-focussed way. In many respects, international instruments are more inclusive and rights encompassing than national law. These instruments serve as a tool to use to assist us in getting our desired outcomes.

International law only becomes binding within our domestic law through the provisions of section 231 and 232 of the Constitution.⁸⁵

⁸⁴ Liebenberg (2010) 103.

⁸⁵ **231. International agreements**

1. *The negotiating and signing of all international agreements is the responsibility of the national executive.*
2. *An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).*
3. *An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.*
4. *Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*
5. *The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.*

232. Customary international law

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

233. Application of international law

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



There are two approaches that regulate the relationship between international law and domestic law, namely the monist⁸⁶ and the dualist approach.⁸⁷ Monists argue that municipal courts must apply rules of international law directly as is, in the international instrument and that there is no need to have them formally 'adopted' by the courts, or to have new law enacted by parliament.⁸⁸

Dualists, on the other hand, believe that these are completely different systems of law, and for international law to apply domestically, it must first be 'adopted' by a court or there must be new law enacted by parliament.⁸⁹

South Africa follows both the monist and the dualist. This is evidenced by section 231 to 233 of the Constitution. Section 232(4) explicitly cements our notion that, for international law to apply in South Africa, it must first be transformed into our local law by the enactment of legislation.⁹⁰ South Africa also takes note of self-executing treaties.⁹¹

3.2. Applicable international instruments

⁸⁶ The monist approach holds that international law and municipal law are the same and must be thought of as '*manifestations of a single conception of law*'.

⁸⁷ Dugard (2012) 42.

⁸⁸ Dugard (2012) 42.

⁸⁹ Dugard (2012) 42.

⁹⁰ Dugard (2012) 42.

⁹¹ Dugard (2012) 56.

Section 231(4) of the constitution talks about self-executing treaties. These are "treaties that automatically become part of municipal law, and enforceable by municipal courts, without any act of legislative incorporation – into South African law". They become part of our law, unless they are inconsistent with the Constitution or an Act of Parliament".



3.2.1. The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹²

South Africa signed the ICESCR in 1994. It was ratified on 18 January 2015 and came into force on 12 April 2015. Ratification means South Africa must honour its obligation in terms of this treaty. The ICESCR has partially been transformed into domestic law, for example the Social Security Act 13 of 2004, partially realises the right to social assistance.

Below I highlight the articles that are important for this mini-dissertation.

Article 9 says: *“the States parties to the present Covenant recognize the right of everyone to social security, including social insurance”*.

Article 11 (1) emphasises the importance of everyone’s right to “an adequate standard of living for himself and his family” and says the State “will take appropriate steps to ensure the realisation of this right”.

General comment 19⁹³ is used to decipher the meaning of article 9.⁹⁴ Basically, the general comment 19 assists the interpreter in interpreting the law in the way the creators envisaged.

According to the general comment, *“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”*.⁹⁵

⁹² UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c.html> [accessed 23 September 2018]

⁹³ General Comment 19 (Thirty-ninth session, 2007) The right to social security (art. 9) E/C.12/GC/19.

⁹⁴ Khoza *Socio-Economic Rights in South Africa* (2007) 105.

General comments are tools used to interpret the specific provisions of treaties. General Comment 19 is the tool used to interpret article 9 of the International Covenant on Economic, Social and Cultural Rights. The purpose of a general comment is to help clarify the meaning of the rights and duties in the covenant.

⁹⁵ General Comment 19 paragraph 1.



Social security promotes social inclusion and is important for poverty reduction and alleviation.⁹⁶ States “*must take effective measures...within their maximum available resources, to fully realise the right of all persons without any discrimination to social security, including social insurance*”.⁹⁷

Reference is made to the Declaration of Philadelphia of 1944⁹⁸ which called for the “*extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care*”.⁹⁹

Social security “should be treated as a social good” and not an “instrument of economic or financial policy”.¹⁰⁰

Most importantly for this mini-dissertation, paragraph 16 states that:

*“in addition to promoting full, productive and freely chosen employment, State parties must endeavour to provide benefits to cover the loss or lack of earnings due to the inability to obtain or maintain suitable employment”.*¹⁰¹

The example of social assistance is mentioned.

⁹⁶ General Comment 19 paragraph 3.

⁹⁷ General Comment 19 paragraph 4.

“state parties of the covenant must take effective measures, and periodically revise them when necessary, within the maximum available resources, to fully realise the right of all persons without any discrimination to social security, including social insurance. The wording in article 9 indicates that all measures that are to be used to provide social security benefits cannot be defined narrowly and, in any event, must guarantee all peoples a minimum enjoyment of this human right. These measures include: contributory and non-contributory schemes (such as universal schemes or targeted social assistance, where benefits are given to those in need)”.

⁹⁸ International Labour Organisation (ILO) Declaration of Philadelphia of 1944.

“The conference recognizes the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve: the extension of social security measures to provide a basic income to all in need of such protection and comprehensive care.”

⁹⁹ Declaration concerning the aims and purposes of the International Labour Organization (ILO), annex to the Constitution of the ILO, section III (f).

¹⁰⁰ General Comment 19 paragraph 10.

¹⁰¹ General Comment 19 paragraph 16.



“The social security system should also cover other workers, including part-time workers, casual workers, seasonal workers, and the self-employed, and those working at atypical forms of work in the informal economy.”¹⁰²

No one should be arbitrarily restricted from existing social security.¹⁰³

Both the ICESCR and the Constitution refer to the concepts of *“taking legislative measures”*, *“progressive realisation”*, and the *“limits of available resources”*.¹⁰⁴ The Constitutional Court¹⁰⁵ took note of these differences. I discuss them in detail in chapter 5.

The ICESCR has an optional protocol,¹⁰⁶ but South Africa is not a signatory to that document and thus I do not believe it is necessary to talk about it in the text.

Jansen Van Rensburg & Lamarche are of the view that, now that South Africa has ratified the ICESCR it cannot *“delay the task of urgently providing basic security to all”*.¹⁰⁷

¹⁰² General Comment 19 paragraph 16.

¹⁰³ General Comment 19 paragraph 9.

¹⁰⁴ Liebenberg (2010) 107.

¹⁰⁵ *Government of the Republic of South Africa v Grootboom* 2001 SA 46.

¹⁰⁶ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).

“The OP-ICESCR is a separate treaty open for signature and ratification by States that are already parties to the ICESCR. It does not create new substantive rights. It sets up a mechanism that makes it possible for individuals or groups to submit a complaint to the Committee in regard to violations of their economic, social or cultural rights by a State party.”

The OP-ICESCR allows for individuals or groups on individuals to submit complaints do the UN Committee on Economic, Social and Cultural Rights. The individuals must be part of the State that has signed the OP-ICESCR.

¹⁰⁷ Jansen van Rensburg L & Lamarche L *“Rights to social security and assistance”* (2005) in Brand & Heyns (ed) *Socio-economic Rights in South Africa* (2005): 210.



3.2.2. Universal Declaration of Human Rights (UDHR) of 1948¹⁰⁸

Declarations are non-binding instruments, created in order to define the obligations of the states. However, the UDHR is binding. This is because it is regarded as customary international law.¹⁰⁹ Customary international law legally binds nations even if it is not formally ratified.¹¹⁰ South Africa is bound by the UDHR because it a member of the community of states. Section 232 of the Constitution, makes it part of South African law 'unless it is inconsistent with the Constitution or an Act of Parliament'.

Article 22 states "*everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and free development of the personality*". Other important provisions are article 23¹¹¹ and 25(1)¹¹², which emphasize the protection against unemployment and an adequate standard of living.

These provisions acknowledge the fact that unemployment is a real problem and importantly illustrate the indignity that comes with not being able to provide for oneself, and that states should assist their people.

¹⁰⁸ GA Res 217A (III), UN Doc A/810 71 (1948).

¹⁰⁹ Jansen van Rensburg & Lamarche (2005) 229.

¹¹⁰ See [Online] Available from: <<http://section27.org.za/wp-content/uploads/2010/04/Chapter5.pdf> >

¹¹¹ Article 23 states that "*everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment*".

¹¹² Article 25(1) state that "*everyone has a right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control*".



3.2.3. International Labour Organisation (ILO) The Social Security (Minimum Standards) Convention No 102 Of 1952

The International Labour Organisation (ILO)¹¹³ defines social protection or social security as “the set of policies and programmes designed to reduce and prevent poverty and vulnerability across the life cycle”. It includes nine main areas:

the protection that 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 leave, employment injury, unemployment, invalidity, old age, and death; the provision of medical care; and the provision of subsidies for families and children”.

The Social Security (Minimum Standards) Convention No 102 of 1952 is regarded as the most comprehensive standard.¹¹⁴

In 2017 the International Labour Organisation prepared a report called the World Social Protection Report.¹¹⁵ It looks at what progress has been made and still has to be made worldwide.

¹¹³ Jansen van Rensburg & Lamarche (2005) 225. The ILO is a specialised agency that produces recommendations and international labour conventions which are binding to states that have ratified them. That the conventions are binding is due to the fact that they have the same status as international treaties. Recommendations are non-binding instruments. They provide clarifications and set the guidelines for the specific issues dealt with in the conventions.

The ILO has developed and adopted a series of international standards which set out a normative framework for the right to social security, which complements existing international human rights instruments.

¹¹⁴ Jansen van Rensburg & Lamarche (2005) 226.

This is because it deals (*inter alia*) minimum standards in nine distinct branches of social security which are: medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity, and survivors’ benefits.

¹¹⁵ World Social Protection Report “Universal social protection to achieve the Sustainable Development Goals” 2017-19. [Online] available from: <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_604882.pdf> (accessed on 28 09 2018)



3.3. Regional Law

Aside from the UN system for human rights protection, three regions in the world (Europe, the Americas and Africa) have developed their own regional human rights mechanisms.

3.3.1. The African Charter on Human and Peoples Rights, 1981 (ACHPR)

South Africa ratified the ACHPR in 1996. The Charter does not specifically make reference to the right to social security. It does mention aspects of social protection and the importance of taking care of the family unit, and stating that the duty is not only on the state but also individuals.¹¹⁶

There are other instruments that acknowledge the need to address “pervasive and persistent poverty, unemployment and under-employment”¹¹⁷ focus on “raising the living standards of the African people”.¹¹⁸

The Southern African Development Community (SADC) also has various instruments that seek to strengthen peoples’ rights to social security. such as the Charter of Fundamental Social Rights in SADC 2003.¹¹⁹ This Charter (which a binding instrument) also makes reference to United Nations instruments in article 3(1).¹²⁰

¹¹⁶ Article 18(1); 18(4); 22(1)-(2)

¹¹⁷ Article 1 of the African Union Declaration On Employment and Poverty Alleviation in Africa of 2004. As mentioned above declarations are not binding.

¹¹⁸ Such as, Article 3(k) of the Constitutive Act of the African Union 2000. South Africa joined the African Union in 1994. Mention also one another instrument that you have in your mind.

¹¹⁹ Article 10(2) states that “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”.

¹²⁰ Article 3(1) states that it “*embodies the recognition by governments, employers and workers in the region of the universality and indivisibility of basic human rights proclaimed in the instruments like the United Nations Universal Declaration of Human Rights; The African Charter on Human and Peoples’ rights, the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments*”.



The Code of Social Security in the SADC echoes article 9 of the ICESCR.¹²¹ The code is a non-binding instrument and simply gives guidelines on the implementation of social security.¹²² It does say that people with “*insufficient means of subsistence to support themselves and their dependents should be entitled to social assistance*”¹²³

3.3.2. African Youth Charter 2006¹²⁴

The AYC, which South Africa has signed and ratified, focuses on empowering the youth in order for it to reach its full potential in an environment conducive to that holistic development.¹²⁵ It also states that young persons have a right to not go hungry¹²⁶ and have the right to social security.¹²⁷

3.4. South African Law

3.4.1. Constitution

¹²¹ Article 1(2) Code of Social Security in the SADC defines social assistance as “*a form of social security which provides assistance in cash or in kind to persons who lack the means to support themselves and their dependants. Social assistance is means-tested and is funded from government revenues. Normally, the beneficiaries are those who are not covered by any other form of social security. The objective of social assistance is to alleviate poverty through, amongst other things, the provision of minimum income support*”.

¹²² Nyenti M & Mpedi LG “The impact of SADC social protection instruments on the setting up of a minimum social protection floor in Southern African countries” PELJ 2012 (15) 1.

¹²³ Article 5(1). Also article 5(2) says *Member States should provide an enabling environment for the provision of social services to both those individuals and groups in the community in need of welfare and development support. Member States should encourage the participation of individuals, civil society organisations, non-state actors and other non-governmental organisations in order to establish and maintain such services*”.

¹²⁴ Adopted on 2 July 2006.

¹²⁵ Article 14(1)

¹²⁶ Article 14(2)

¹²⁷ Article 14(3)



The right to social security and social assistance

Social security¹²⁸ and social assistance¹²⁹ fall under the umbrella of social protection. The aim of social security rights is to protect a person's right to human dignity – one of the fundamental rights in our constitution.¹³⁰

Section 27(1)(c) says that “*everyone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance*”. Section 27(2) states that the state must take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”¹³¹

Section 27(1)(c) encapsulates both social security and social assistance. It recognises the need for social assistance if you cannot pay for social security (due to unemployment or low wage). Simply saying “access to” and not “the right to” social security was seen as a way of limiting the right.¹³²

According to Jansen van Rensburg (et al) the *Grootboom* case changed this. The court held that the:

“right to have access to housing” can be interpreted as broader than the ‘right to housing’. The right does not only require the state to provide certain basic resources. It also imposes an obligation on the part of the state to create an

¹²⁸ Jansen van Rensburg & Lamarche (2005) 210. Social security is a form of social protection; people need to contribute parts of their earnings to it in order to be able to be protected. Examples include pension and provident funds or the Unemployment Insurance Fund.

¹²⁹ Jansen van Rensburg & Lamarche (2005) 211. Social assistance is also a form of social protection, it is needs-based assistance from the state and individuals do not contribute to it. For example, the social grants.

¹³⁰ Jansen van Rensburg & Lamarche (2005) 235.

¹³¹ Section 27(2) of the Constitution of the Republic of South Africa, 1996.

“When section 27(2) is read in conjunction with section 2 the assumption can be made that the fundamental right to access to social security is enforceable, because section 2 explicitly states that duties imposed by the constitution must be performed”. Olivier & Jansen van Rensburg “Protecting and enforcement of the right to social assistance (2000) *African Journals Online* 88.

¹³² Jansen van Rensburg & Lamarche (2005) 234.



*infrastructure and the conditions to give an individual or group access to these facilities or services. When the judgment of the court is made applicable to social security rights, the conclusion can be reached that ‘access to’ means more than a pure right to. It suggests that the state will also have to provide, by way of legislative and other measures, that everyone has access to a range of measures aimed at the realisation of social security’.*¹³³

According to Fombad¹³⁴ the constitutional entrenchment of the right to social security is the “best way” of “recognising, protecting and enforcing this right” because “it puts pressure on the State and ensures that the State does not arbitrarily enact legislation that undermines this right”.¹³⁵

In the SA context, the exclusion of people aged 18-59 years from being able to access social assistance undermines the right using enacted legislation.

3.4.2. Social Security Act 13 of 2004

This Social Security Act was enacted to realise the right to social assistance in the form of grants. Its preamble repeats verbatim, section 27(1)(c) & 27(2) of the Constitution. It then takes a 180 degree turn and “defines” social assistance and social grants by stating the category of grants that are provided¹³⁶ and not what the terms actually mean. This results in a system where “if you do not fit into those categories, you cannot access the grants”.¹³⁷

By defining social assistance in this way it is able to exclude persons who “are unable to support themselves and their dependents”. Unemployed persons aged between 18 and 59 years are statutorily excluded from accessing their constitutionally mandated social assistance, which I argue is unconstitutional. This is an example of where the

¹³³ Jansen van Rensburg & Lamarche (2005) 234.

¹³⁴ Fombad “An overview of the Constitutional Framework of the Right to Social Security with Special Reference to South Africa” 2013 *African Journal of International and Comparative Law* 11.

¹³⁵ Fombad (2013) 11-12.

¹³⁶ Section 1 of the Social Security Act 13 of 2004.

¹³⁷ Sinclair “Poverty: giving meaning to the right to social assistance” 2012 *Stell LR* 200.



State arbitrarily enacts legislation that undermines this right the right to social assistance.¹³⁸

3.4.3. Policy Documents¹³⁹

Due to constraints, I can only briefly discuss a few and how they influence my topic.¹⁴⁰

The **Reconstruction and Development Programme (RDP) 1994** was the first policy framework developed by an ANC-led alliance. It advocated for a strong welfare system for the “vulnerable”¹⁴¹, and then stated that ‘a system of “handouts” for the unemployed should be avoided.’¹⁴² It would assist the unemployed through jobs created in the public works programme.¹⁴³The government did manage to expand service delivery to give effect to socio-economic rights. It has financed and implemented new programmes such as: the Primary School Feeding Scheme, Child Support Grant, Home and Community Based Care, and expanded on the Disability and Older Persons Grant.¹⁴⁴

The **Growth, Employment and Redistribution (Gear) Strategy 1996** was a more conservative economic policy that strongly advocated that private-sector-driven growth was the solution we need for job creation and in turn poverty reduction. ¹⁴⁵

¹³⁸ Fombad (2013) 11-12.

¹³⁹ The Reconstruction and Development Programme;

¹⁴⁰ Department of the Presidency ‘Twenty Year Review South Africa 1994-2014’ launched by President Jacob Zuma on 11 March 2014.

¹⁴¹ Paragraph 2.3.3 “the old, the disabled, and the sick who currently live in poverty”.

¹⁴² Paragraph 2.3.3 RDP.

¹⁴³ Paragraph 2.3.5. RDP.

¹⁴⁴ Khoza (2007) 135.

¹⁴⁵ The vision was to create a fast growing economy and then enough jobs will be created by the private sector to erase unemployment. This meant reducing government spending on social and basic services through budget reform and social grants were limited to assisting only needy children, the elderly and the disabled. GEAR (1996) 10-15.



GEAR garnered a lot of criticism from various stakeholders, such as civil society organisations.¹⁴⁶ GEAR did not ‘deliver what it had promised in terms of poverty and inequality reduction’¹⁴⁷ but did have some positive aspects for the economy.¹⁴⁸

South African has had other government policies.¹⁴⁹ The most important one now is the **National Development Plan (NDP) 2030**¹⁵⁰.

The NDP aims to eliminate poverty and reduce inequality by 2030. Outcome 13 talks about ‘an inclusive and responsive social protection system’. Income support for the unemployed will be provided through “various labour market initiatives such as public works programmes and, training and skills development, and other labour market related incentives.”¹⁵¹

3.4.4. White Paper on Social Welfare 1997

This document is not legislation. It is a document issued by a government department, published to elicit public comment as part of a process of public participation. It may possibly lead to legislation.

Paragraph 1 of the preamble of the White Paper for Social Welfare in South Africa (hereinafter “White Paper”) states the following:

¹⁴⁶ Khoza (2007) 135-136. This is because GEAR put a stop to expanding basic and social spending, while the Constitution called for prioritising spending on basic and social services. Also the GEAR strategy to fight poverty based on the false assumptions that private sector investment would necessarily create a lot of jobs for poor people.

¹⁴⁷ Streak JC (2004) the gear legacy: did gear fail or move South Africa forward in development? Development Southern Africa, 1 October 2010. [Online] Available from: <www.tandfonline.com/doi/abs/10.1080/0376835042000219541> (accessed 10 November 2018).

¹⁴⁸ It helped produce a big reduction in the government’s debt which resulted in a much better position to expand socio-economic rights programme. GEAR created a favourable environment for private investment and economic growth necessary to finance socio-economic rights spending, which led to lower interest rates and reduced and more predictable inflation rates. Budgetary and legal reform started under GEAR has improved the capacity of government spending on socio-economic rights even though there are still huge administrative challenges still present.

¹⁴⁹ The Accelerated and shared growth initiative which planned to half unemployment by 2014, which did not materialise, the Millennium Development Goal (MDG)¹⁴⁹; New Growth Path (NGP)

¹⁵⁰ National Development Plan 15 August 2012.

¹⁵¹ National Development Plan (2012) 72.



“South Africans are called upon to participate in the development of an equitable, people-centred, democratic and appropriate social welfare system. The goal of developmental social welfare is a humane, peaceful, just and caring society which will uphold welfare rights, facilitate the meeting of basic human needs, release people’s creative energies, help them achieve their aspirations build human capacity and self-reliance, and participate fully in all spheres of social, economic and political life.”¹⁵²

By stating “South Africans” not just “the government”, the white paper shows that all of us need to actively contribute in order to create a caring, and value-driven society. We should not believe, that it is normal for a huge chunk of our society to impoverished.

Chapter 1 of the white paper deals with the overview of the South African social welfare context. It illustrates the issues faced by South Africa and the need to reform. Declining economic growth rates; decrease in per capita income; extreme inequality¹⁵³ and large scale unemployment,¹⁵⁴ are just some of the factors mentioned.

The economy of South Africa has been unable to supply sufficient employment opportunities for all those who are of working age, who want to work. Unemployment has been especially harsh on women and persons with disabilities.¹⁵⁵

The white paper identifies (amongst other things) lack of education, lack of employment opportunities and lack of access to services as the objects that deprive

¹⁵² White Paper for Social Welfare in South Africa (1997) Preamble paragraph 1.

¹⁵³ White Paper for Social Welfare in South Africa (1997) Chapter 1 paragraph 1.

¹⁵⁴ White Paper for Social Welfare in South Africa (1997) Chapter 1 paragraph 2.

¹⁵⁵ White Paper for Social Welfare in South Africa (1997) Chapter 1 paragraph 2.

It notes that due to the fact that the economy has become less labour-intensive and the fact the fact that it can only provide employment for half of the labour force, it now needs fewer, but better skilled people than in the past to produce the same level of output. The South African labour force is characterised as being relatively young with low overall skills level that is brought about by poor educational opportunities.



people of their dignity and that create a situation where people cannot look after themselves.¹⁵⁶

Chapter 2 deals with the national developmental social welfare strategy and defines its vision as: “a welfare system which facilitates the development of human capacity and self-reliance within a caring and enabling socio-economic environment.”¹⁵⁷ It defines its mission as:

“to serve and build a self-reliant nation in partnership with all stakeholders through an integrated social welfare system which maximizes its existing potential, and which is equitable sustainable, accessible, people-centred and developmental”.

“A wide range of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual’s earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty. And secondly, in order to maintain children.”¹⁵⁸

The White Paper is very vocal about a comprehensive social security model, even though it does not specifically talk about a Basic Income Grant. There are many examples of where it blatantly eludes to it. Firstly, the above quotation is about *securing basic welfare rights*.

The White Paper states that “the government will take steps to ensure the progressive achievement of social security for all including appropriate social assistance for those unable to support themselves and their dependents”.

¹⁵⁶ White Paper for Social Welfare in South Africa (1997) Chapter 1 paragraph 3.

At that time 2.1 million out of the 7.1 million people between the ages of 16 and 24 years, had not matriculated and were not in school.

¹⁵⁷ White Paper for Social Welfare in South Africa (1997) Chapter 2 paragraph 1.

¹⁵⁸ White Paper for Social Welfare in South Africa (1997) Chapter 7, paragraph 1 and 2.



3.5. Conclusion

The international law provides for social assistance for all, the Constitution as well provides for it. South Africa has now tried to go around it through subsidiary legislation. The Social Security Act, including the subsequent policies adopted by the government show the reluctance of the government to have/provide social assistance for all who need it. They are viewed, not as a right but as handouts. In the meantime, those without employment suffer. Since the advent of democracy, the government has tried to steer clear of realising the right to social assistance for all as envisaged in the Constitution. It has advocated for job creation and stimulating the economy in order to create those jobs. Sadly, this has not yielded the required and expected result. While all this happens adults who are of working age must patiently wait in destitution for jobs to be created. Even the extended public works programmes targeting unskilled youth has not yielded the required results and individuals who are not considered “youths” due to age, cannot benefit from these programmes and cannot benefit from the grant system, because they are too old to be “youths” but younger than 60 years old.



Chapter 4 - The Basic Income Grant

4. Introduction

In this chapter I discuss the Basic Income Grant (BIG), how it can assist with income poverty of everyone in South Africa including those individuals who are unemployed aged between 18 and 59 years. I discuss the arguments for and against the BIG. Due to limitations I am not able to go into detail regarding how the BIG would be financed, as that research has already been compiled by others. I discuss how the Basic Income Grant amounts to the right to social assistance as provided in section 27(1)(c) of the Constitution. This Chapter is the longest chapter as here I look into the different discussions that have occurred, regarding the Basic Income Grant as well as the proposed mechanism to fund the grant.

4.1. What is The Basic Income Grant?

‘A Basic Income Grant is provided as an entitlement and without a means test... by removing the stigma that labels the recipient as “poor”, the grant is said to bolster economic support without draining psychological resources. The Committee understood the Basic Income Grant as a social policy option, to be defined as “a general social assistance grant for all South Africans.”’¹⁵⁹

The Basic Income Grant, sometimes known as the “solidarity grant / citizens stipend”, is an amount of money that is paid every month, to every citizen and legal resident who has been in the country legally for at least one year.¹⁶⁰ “It is paid to every individual as a right, [it is] not based on the household unit, and [is] paid regardless of marital status, family status, race, gender, and work status.”¹⁶¹ The Basic Income Grant, as

¹⁵⁹ Taylor Committee Consolidated Report “Transforming the past- Protecting the future” Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002) 61.

¹⁶⁰ Standing & Samson *A Basic Income Grant for South Africa* (2003) 10.

¹⁶¹ Standing & Samson (2003) 10.



proposed in Taylor Committee Report of 2002, would be R100¹⁶² given every month to every individual unconditionally.¹⁶³

4.2. Brief historical background on the Basic Income Grant

In 1994, South Africa had 20% unemployment.¹⁶⁴ The new government had inherited a country where 58% of all South Africans and 68% of Africans lived in poverty.¹⁶⁵ The history of poverty in South Africa has been discussed at length in Chapter 2. I have also discussed the laws and policies that govern social security in chapter 3.

The BIG has quite an interesting history in South Africa. It surfaced due to different reasons, one of which is that it is a way to combat our current ill-equipped social safety net that we brought along from the apartheid era. South Africa's social security system is modelled on "welfarist" programmes developed and designed for industrialised countries, which are characterised by full employment and the premise that social assistance is used to address "special cases" and unforeseen events and fluctuations in the economy cycle.¹⁶⁶ The government of 1994 chose to extend the existing social security system instead of creating a new one that would be specifically geared at addressing the issues faced by South Africans at the time. The model is based on the premise that the state is only obliged to help those who cannot be employed due to age or physical incapability (e.g. children, elderly and the disabled). It is based on the premise that those able-bodied individuals who are of employable age (18 – 59 years) will all have employment. They only require assistance in special cases such as if they

¹⁶² This is the amount was the one originally proposed in the Taylor Report. Today, the grant would have to be inflation indexed and reference would have to be made to the Food Poverty Line, which is R547. The grant would have to increase yearly to account inflation.

¹⁶³ Thurlow "Can South Africa Afford to Become Africa's First Welfare State?" USBIG Discussion Paper No 43, November 2002 2; "A single person living alone would receive R100 per month while a household of six people receives R600 a month." The Taylor Report (200) 61.

¹⁶⁴ Staff Writer (2015) South African Unemployment: 1994-2015. 21 January 2015. [Online] Available from: <<https://businesstech.co.za/news/general/77737/south-africa-unemployment-1994-2015/>> (accessed 7 Oct. 2018)

¹⁶⁵ Bundy *Poverty in South Africa Past and Present* (2016) 134.

¹⁶⁶ Bundy *Poverty in South Africa Past and Present* (2016) 123.



lose their job or get injured on the job. They are then assisted, until they secure a new job. South Africa has never had that status quo.

According to Standing and Samson social security systems around the world are in crisis and it is because of the following reason:

The “economic [market], labour market and social changes have put them under increasing strain and governments everywhere have been rushing to make changes that have been weakening income security, undermining social solidarity, and accentuating inequalities”.¹⁶⁷

According to Standing and Samson there are certain changes that must be taken into account when assessing a feasible and desirable social protection system for a country like South Africa.¹⁶⁸ These include recognising the flexible labour relations that are continuing to spread due to economic liberalisation;¹⁶⁹ and taking note of the increasing economic informalisation in South Africa.¹⁷⁰ More and more people are joining the informal sector and have no benefits, or social security to assist them in times of need. This means that our current social security system cannot appropriately assist people because it is based on the “transfer of surplus labour from the ‘traditional,

¹⁶⁷ Standing & Samson (2003) 2.

¹⁶⁸ Standing & Samson (2003) 2.

¹⁶⁹ Economic liberalisation means “the lessening of government regulations and restrictions in an economy in exchange for greater participation by private entities; the doctrine is associated with classical liberalism. Thus liberalisation in “the removal of controls” in order to encourage economic development.” What does economic liberalization mean?
<https://www.definitions.net/definition/economic+liberalization>

These flexible labour relations have resulted in most workers having weaker employment security as well as having income insecurity due to the flexible wage system, even when they have “formal jobs”. This current state of affairs is vastly different to the norm of industrialised society of the mid decades of the 20th century, “for which the social-insurance based welfare states were constructed”.

Standing & Samson (2003) 2.

¹⁷⁰ Economic informalisation goes in the opposite direction to the long-accepted economic development model, where development is almost defined in terms of a steady transfer of surplus labour from the “traditional, informal sector” to the “modern, formal sector”. Standing & Samson (2003) 2



informal sector' to the 'modern, formal sector'"¹⁷¹ If we do not adjust our social transfer policy to overcome this trend, the 21st century labour markets will be characterised by far more "working poor".¹⁷²

Even in most affluent European countries there is an increasing proportion of those in employment receiving incomes that put them into poverty.¹⁷³ The discourse around the Basic Income Grant has garnered worldwide attention with some countries implementing pilot programmes of the Basic Income Grant.¹⁷⁴

4.3. The Basic Income Grant within the South African context

The idea of a Basic Income Grant was introduced in the 1997 Welfare White Paper in the form of social protection.¹⁷⁵ There it was declared that *"there will be universal access to an integrated and sustainable social security system. Every South African should have a minimum income, sufficient to meet basic subsistence needs, and should not have to live below minimum acceptable standards"*.¹⁷⁶

During the consultative period for the Welfare White Paper, the Congress of South African Trade Unions (COSATU) made submissions¹⁷⁷ which they wanted included in the White Paper stating:

"The Constitution provides a good starting point to understanding what is required of government in the provision of social security... These

¹⁷¹ Standing & Samson (2003) 2.

¹⁷² Standing & Samson (2003) 2.

¹⁷³ Standing & Samson (2003) 3.

¹⁷⁴ Alaska is the first to introduce a partial basic income. From 1982 Alaska paid a dividend each year to all its inhabitants. Brazil, in 2004 became the first country in the world to pass a law establishing the right to a basic income for citizens; Namibia's Basic Income Grant Coalition started a two-year pilot programme in January 2008; In 2011, India implemented two pilot schemes. See [Online] Available from: <www.globalincome.org/English/BI-worldwide.html#Alaska> (accessed on 11 11 2018).

¹⁷⁵ BIG Financing Reference Group (2004) 17.

¹⁷⁶ White Paper for Social Welfare (1997) chapter 7 paragraph 27.

¹⁷⁷ COSATU "Submission on Social Welfare White Paper" Presented to the Department of Welfare and Population Development, 4 November 1996.



*Constitutional provisions place a positive obligation on government to put systems in place to ensure that every South African has access to social security. In certain circumstances where people are unable to support themselves, this duty goes even further as government will be duty bound to take steps to assist people who are unable to support themselves.*¹⁷⁸

The formal proposal for a South African Basic Income Grant was first presented during the bilateral discussion between the government and the labour department in 1998. The Minister of Trade and Industry requested further motivation at the next session of bilateral discussion.¹⁷⁹ COSATU,¹⁸⁰ produced a document outlining key elements of the BIG, as well as responses to possible opposition. This led to a formal agreement to investigate the proposed BIG in the context of a comprehensive investigation into our social security system.¹⁸¹

The Minister of Social Development at the time, Mr Zola Skweyiya,¹⁸² was viewed as a great proponent of the Basic Income Grant, which was not the view held by his colleagues and leaders.¹⁸³ In the year 2000 the Minister appointed a Committee of Inquiry, chaired by Professor Vivienne Taylor, to carry out the investigation on the BIG. After lengthy research a report was published in 2002.¹⁸⁴ It formally recommended the introduction of a BIG as a core of a comprehensive social protection package and the

¹⁷⁸ COSATU (1996) Submission 2.

¹⁷⁹ BIG Financing Reference Group (2004) 18.

¹⁸⁰ The research was commissioned in 1997. Its main finding was that the introduction of a basic income grant would be most effective way of remedying the defects in the social security system inherited from apartheid. The research was conducted by Drs Claudia and Dirk Haarman.

¹⁸¹ BIG Financing Reference Group (2004) 18.

¹⁸² Served as the Minister for Social Development for two terms from 1999-2009.

¹⁸³ President Mandela, President Mbeki and President Zuma were opposed to South Africa being an “welfarist state”, Pres Mandela spoke of his government’s “commitment to confront the scourge of unemployment, not by handouts but by the creation of work opportunities”; Pres Mbeki referred to himself as a “Thatcherite” when it comes to the welfare system during his announcement of GEAR in 1996. Margaret Thatcher often spoke of her disdain for “handouts” and “welfare dependency”. Pres Zuma in 2011, said: “we cannot be a welfare state. We cannot sustain a situation where social grants are growing all the time and think it can be a permanent future”. Bundy (2016) 126.

¹⁸⁴ The 2002 report of the Taylor Committee of Inquiry into a Comprehensive Social Security System for South Africa entitled “Transforming the present – protecting the future”.



most effective way of combatting income poverty. A broad spectrum of civil society organisations rallied behind the Taylor Committee recommendations, becoming the Basic Income Grant Coalition.¹⁸⁵

However, until now the government has not formally stated where it stands when it comes to the BIG. The Minister of Finance and Treasury officials criticised BIG even though they were represented on the Taylor Committee.¹⁸⁶ In an interview after the July 2003 Lekgotla, the spokesperson of the government, Mr Joel Netshitenze stated the following: ‘people need to be afforded “the dignity of work” rather than to rely on government grants’, and that ‘grants should be limited to the special cases requiring government support’.¹⁸⁷

South Africa’s unemployment is structural.¹⁸⁸ To advocate for the “dignity of work” to combat unemployment is seriously flawed. People do not choose to be unemployed, South Africa does not have enough jobs for the amount of people that need them. Until those jobs are created, impoverished individuals have to for those jobs to be created.

4.4. A brief look at the recommendations of the Taylor Committee Report

The Taylor Committee found that the social security system continued to exclude the majority of the poor:

¹⁸⁵ List of organisations as of November 2003: Activists Networking Against the Exploitation of Child Domestic Workers, Age-in-Action, AIDS Consortium, Alliance for Children’s Entitlements to Social Security, Anglican Diocese of Johannesburg, Black Sash, Children’s Institute, Church of the Province of South Africa, Community Law Centre (UWC), Congress of South African Trade Unions, Co-operative for Research and Education, Diakonia Council of Churches, The Dominican Order, Earth Africa, Ecumenical Service for Socio-Economic Transformation, Foundation for Contemporary Research, Gender Advocacy Programme, HOPE Africa, IDASA, Joining Hands Against Hunger, Joint Enrichment Programme, Missionaries of Africa in South Africa, NADEL Human Rights Research and Advocacy Project, Planact, Resources Aimed at Preventing Child Abuse and Neglect, Southern African Catholic Bishops’ Conference AIDS Office, South African Council of Churches, South Africa New Economics Foundation, South African NGO Coalition, Treatment Action Campaign, Women on Farms Project, Young Christian Workers National Secretariat.

¹⁸⁶ BIG Financing Reference Group (2004) 19.

¹⁸⁷ BIG Financing Reference Group 30; Standing & Samson *A basic income grant for South Africa* (2003) 122.

¹⁸⁸ BIG Financing Reference Group (2004) 19.



“There is no income support for children between 7-18 years¹⁸⁹, adults between 18-59 years (or) general household assistance where no one is employed. Over 13 million live below the poverty line and have no access to social security... SA’s social security system is neither comprehensive nor adequate.”¹⁹⁰

Due to South Africa being a developing country, attempting to cope with the structural legacies of the former government, it is unlikely that it will be able to create stable and meaningful employment opportunities for all economically active adults in the foreseeable future. Also a narrow, employment-centred concept of social security is therefore insufficient to meet the challenges of poverty and inequality. ¹⁹¹

The Taylor report also made mention of the fact that “Social welfare policies based on the notion of close to full employment (where unemployment is largely cyclical) are clearly inapplicable to the South African situation. Our unemployment is structural and hence the concept of traditional social security based on industrialised country norms is not applicable”.¹⁹²

The Taylor Committee recommended the adoption of the notion of social protection, based on five components, (1) income poverty alleviation, (2) capability poverty alleviation, (3) asset poverty alleviation, (4) special needs and (5) social insurance.

One of the main proposals stated that the Basic Income Grant be phased in as a matter of urgency, starting with the expansion of the Child Support Grant. The reason for this was theorised as that it had the potential to “reduce poverty and promote human development and sustainable livelihoods” and is “easier to roll out in the short term than... (other) poverty programmes”.¹⁹³

¹⁸⁹ This has since changed. The Child Support Grant was extended to the age of 18 years.

¹⁹⁰ BIG Financing Reference Group 24-25.

¹⁹¹ BIG Financing Reference Group 25

¹⁹² BIG Financing Reference Group 25

¹⁹³ BIG Financing Reference Group 25.



4.5. Arguments in favour of the Basic Income Grant

4.5.1. The grant would target the poor effectively

The BIG is not means tested, it is universal, given to all legal citizens and legal residents as a right. Each member of the household will receive their own grant, even those who are currently excluded, aged between 18 and 59 years.¹⁹⁴ The Big would close the poverty gap by 74% and the vast number of impoverished individuals who were unable to access social assistance would be zero, because this grant would cater for them.¹⁹⁵

4.5.2. The Basic Income Grant will be cost effective

The grant would be universal, and given to everyone as a right, unlike the means-tested grants. This means that there is no need to hire personnel to investigate the applications. The money would go straight to the beneficiaries, there would be no place for administrative abuse and corruption.¹⁹⁶

4.5.3. The Basic Income Grant will be developmental

This grant would be developmental in that those currently excluded would benefit directly from it. The “working poor” who currently bear the burden of assisting their unemployed family member, would also benefit directly from the grant (for example, save some of the money) and indirectly because now their unemployed family members also have some form of assisted income to stave off destitution. The BIG would provide the means for discouraged work seekers to be able to go look for work, like go to internet cafes, to type out CVs, look for vacancies and be able to go to potential job interviews. Some may even be able to start small businesses.¹⁹⁷

¹⁹⁴ BIG Financing Reference Group (2004) 26

¹⁹⁵ BIG Financing Reference Group (2004) 26-27.

¹⁹⁶ BIG Financing Reference Group (2007) 27.

¹⁹⁷ BIG Financing Reference Group (2007) 28



4.5.4. The Basic Income Grant would stimulate economic growth

Families would be able to buy the necessities they need as well as have the opportunity to save. The BIG would give many individuals the opportunity to start small businesses, for example sell fruits and vegetables. This would stimulate the local economy. There would be no need to have to travel to supermarkets. This would be ideally helpful to rural areas and townships. The increased consumption would result in more economic activity and this would benefit the broader economy as well.¹⁹⁸

4.5.5. The Basic Income Grant would combat the “poverty tax”

The “working poor” those who have informal employment with no benefits, currently bear the responsibility of helping their impoverished family members. We have also recently seen through the Fees Must Fall¹⁹⁹ campaign, the plight of children of the “missing middle”²⁰⁰ class was front and centre. They are not eligible to get National Student Financial Aid Scheme (NSFAS), because one or both parents are working, but they also cannot afford university tuition due to the fact that that the breadwinner has to support not just their family but also extended family members. We are also seeing the effects of this through the notion of Black Tax,²⁰¹ where a person who is the first generation to go to university or completes a degree, now gets formal employment. Due to the socio-economic background and the fact that they are the first person in the family to get gainful formal employment, the family now looks to them for support. The BIG would assist in alleviating the pressure on those individuals currently supporting their families and extended families.

¹⁹⁸ BIG Financing Reference Group (2004) 28.

¹⁹⁹ Protests that started in 2015.

Wits University Press “#FeesMustFall: the poster child for the new forms of struggle in South Africa?” 21 November 2016 The Conversation. [Online] Available from: <https://theconversation.com/feesmustfall-the-poster-child-for-new-forms-of-struggle-in-south-africa-68773> (accessed 20 November 2018).

²⁰⁰ University of Johannesburg “Are you part of the missing middle?” News24 25 July 2016. [Online] Available from: <https://www.news24.com/PartnerContent/are-you-part-of-the-missing-middle-20160715> (accessed on 20 November 2018).

²⁰¹ Nkosazana Ngwadla “The burden of Black tax” 2 March 2018 Fin24 [Online] Available from: <https://www.fin24.com/Money/the-burden-of-black-tax-20180309> (accessed 20 November 2018).



Similar to the working poor, they are the only ones with an income. This stifles growth because the one salary has to be stretched over a number of family members and there is no choice but to help.

The BIG would alleviate the pressure and enable the workers to direct some parts of their income to “productivity enhancing consumption and social investment.”²⁰²

4.5.6. The Basic Income Grant would improve the efficiency of social investment

The grant would enable families to meet their basic health and education needs. Many families have to live on the child support grant because it is the only income available and it is not a lot of money. The BIG would supplement the existing income and enable families to purchase the food they require resulting in healthier children and a stronger workforce.²⁰³

4.5.7. The Basic Income Grant will enhance responses to the HIV/AIDS pandemic

At the time of the report, the impact of HIV on society was quite dire. Many working age adults that were diagnosed with the virus were unable to work; medicines (that are now readily available) were not as accessible as they are now. This meant that persons living with HIV, were unable to work due to debilitating nature of the virus and the same persons with HIV are excluded from getting social assistance. With there is no social assistance for individuals with illnesses. With BIG they would be able to buy the nutritious food they require.²⁰⁴

4.5.8. The Basic Income Grant will contribute to equity and social cohesion

BIG would be financed through the tax system. The rich would subsidise the impoverished. This illustrates that the responsibility to promote social cohesion lies with all of us and not just with the government. This point illustrates some aspects of transformative constitutionalism. The notion of working towards the future that we all

²⁰² BIG Financing Reference Group (2004) 28.

²⁰³ BIG Financing Reference Group (2004) 28.

²⁰⁴ BIG Financing Reference Group (2004) 28



want to be a part of and leaving no one behind. Financing BIG through a progressive tax system would make society accountable and also eradicate inequality created by a system of oppression. The crime rate would decrease and we would have more stability because young persons would get the assistance they need to stave off hunger. Women would be empowered and be self-sufficient. It could even act as a form of general reparations as proposed by the Truth and Reconciliation Commission.²⁰⁵

4.6. Arguments against the Basic Income Grant

4.6.1. Productive employment versus “Hand-Outs”

There are some individuals who view social grants as an alternative to work. This is illustrated by the claim that “people need to be afforded ‘the dignity of work’ rather than to rely on government grants”, and that “grants should be limited to the special cases requiring government support”.²⁰⁶ A claim like this disregards the poverty trap that millions of SA citizens are faced with as well as the multi-faceted response provided by the Taylor Committee.²⁰⁷ “At best it is misguided and at worst a cruel hoax”.²⁰⁸ The majority of unemployed individuals of working age have little prospect of formal employment this is due to the long-term and structural nature of unemployment.²⁰⁹ The Taylor Report and the BIG Coalition advocate for a more developmental package, which links income security (BIG) and other measures (extended public works programme) to address the different forms of poverty.²¹⁰ The previously marginalised majority needs to be integrated into the mainstream economy as consumers and as

²⁰⁵ BIG Financing Reference Group (2004) 28

²⁰⁶ BIG Financing Reference Group (2004) 30; Standing & Samson *A basic income grant for South Africa* (2003) 122.

²⁰⁷ BIG Financing Reference Group (2004) 29-30.

²⁰⁸ BIG Financing Reference Group (2004) 30.

²⁰⁹ BIG Financing Reference Group (2004) 30.

²¹⁰ Namely: “*income poverty, services poverty, and asset poverty; and proposes Comprehensive Social Security Package to address these forms of poverty in an integrated way*”.

BIG Financing Reference Group (2004) 30.



producers.²¹¹ By guaranteeing that everyone gets a minimum income, we enable them to engage in economic activity in the long and short-term. People become self-reliant and we decrease the number of people who need a grant to fend off destitution.²¹²

4.6.2. Developmental Social Security or “Dependency”

There is the belief that giving unemployed individuals, who are of working age, a grant creates a state of dependency and that people would rather get “hand-outs” instead of working. Those who believe in this notion also promote the selective social security system, which helps only those deemed “deserving”.²¹³ This system is thought of as developmental because it helps those deemed “deserving” while able-bodied unemployed people must be self-reliant.²¹⁴ This is the system we currently have, which is not a comprehensive social security system because of the huge gap that those who are unemployed aged between 18 and 59 years fall through.²¹⁵ The BIG would empower the impoverished and lessen dependency, which makes it developmental.²¹⁶ The BIG is not enough money to make individuals unwilling to work, it is enough to stave off hunger.²¹⁷

4.6.3. Opportunity costs and Public Works

There is a view that the BIG would take money away from existing programmes that have been put in place to assist with unemployment, like the Expanded Public Works Programmes (EPWP). The BIG and EPWP are pitted against each other instead of both being used together to achieve the comprehensive social protection system as

²¹¹ Standing & Samson *A basic income grant for South Africa* (2003) 122.

²¹² BIG Financing Reference Group (2008) 30.

²¹³ “Those belonging to some particularly vulnerable groups, such as poor children, the aged and the disabled.” BIG Financing Reference Group (2004) 31.

²¹⁴ BIG Financing Reference Group (2004) 31.

²¹⁵ BIG Financing Reference Group (2004) 31.

²¹⁶ BIG Financing Reference Group (2004) 31.

²¹⁷ BIG Financing Reference Group (2004) 32.



envisaged by the Taylor Committee and the Basic Income Grant Currie & De Waal *The Bill of Rights Handbook* (2013) 146.

In the words of the Basic Income Grant Coalition:²¹⁸ “[T]here is evidence that that public works programmes, in isolation, are not a cost-effective strategy to alleviate income poverty on the massive scale needed in South Africa.”²¹⁹ In order to significantly reduce unemployment for the 3.2 million “workerless” households, there would need to be a much larger public works programme.²²⁰ PWP’s are important for training individuals, getting them ready for formal employment and improving public infrastructure.²²¹ According to the Basic Income Grant Coalition, “no coherent argument or economic projections have been advanced to substantiate the view that our economy cannot fiscally sustain both the introduction of a BIG as well as larger scale PWPS”.²²²

4.6.4. Lack of capacity to implement

There is a view that government would not be able to implement a universal grant.²²³ The Taylor Committee addresses this issue, firstly by making the grant universal and removing the means test because it hinders impoverished households from being able

²¹⁸ BIG Financing Reference Group (2004) 32-33.

²¹⁹ “Dr. Anna McCord has calculated that even if the expanded Public Works Programme... achieves its goal of creating 200 000 jobs per annum over the next five years, it is not likely to have a significant impact on unemployment, given the scale of the nation’s unemployment crisis.” Anna McCord “Public Works as a Component of Social Protection in South Africa” Paper delivered to the Basic Income Grant Coalition National Conference, 2 December 2003, Soweto, 6. BIG Financing Reference Group (2004) 33.

²²⁰ The estimated costs being R16.8 billion to R28 billion per year, to create 3.2 part-time jobs. The costs increase to 37 billion to 61.6 billion a year if permanent jobs are created. BIG Financing Reference Group (2004) 33.

²²¹ BIG Financing Reference Group (2004) 34-35. McCord writes: “*The evidence available in South Africa and internationally suggests that in and of themselves, public works programmes ... do not necessarily move participants out of poverty, but offer a temporary respite, reducing the depth of poverty during the period of employment, and they do not offer sustainable livelihood improvements without a range of complementary social development interventions.*” McCord concludes that “*given no significant new allocations are to be made to fund the programme, expectations regarding its impact may not be realistic in terms of reducing poverty, creating sustainable jobs, improving training and stimulating economic growth.*”

²²² BIG Financing Reference Group (2004) 35.

²²³ BIG Financing Reference Group (2004) 35.



to access the grants because they have to prove that they are eligible.²²⁴ Secondly, the South African Revenue Service would be used to recover the money and we would need to start the “strengthening of the public sector financial institutions [such as the Post Office Bank] to facilitate delivery”.²²⁵ The Taylor Committee makes the point that *“the state has ample capacity to recover a substantial portion of the gross cost of a BIG through the tax system, thanks to the efficiency of the SA Revenue Service”*.²²⁶ The Taylor Committee says that the grant would need to be phased in over several years, in order to have the “necessary systems and administrative capacity to be put in place”.²²⁷

4.6.5. Affordability and fiscal sustainability

There are some key stakeholders who are vehemently against it and question its affordability, such as the then Minister of Finance, who told parliament that the Basic Income Grant would cost R60 Billion.²²⁸ This number is based on the gross costs of the BIG if it were delivered under the current means-tested grant system and the administrative cost required to deliver them.²²⁹ The Taylor Committee found that the net costs of BIG would amount to R24 Billion per year. The Minister said this even though there were two senior treasury officials who were part of the Taylor Committee which found that the BIG was feasible and *“affordable when seen from a long-term perspective as all improvements... occur broadly within current macroeconomic*

²²⁴ BIG Financing Reference Group (2004) 35.

²²⁵ BIG Financing Reference Group (2004) 35.

²²⁶ BIG Financing Reference Group (2004) 36.

²²⁷ BIG Financing Reference Group (2004) 36.

At that time the committee proposes that a universal Child Support Grant (up to 18) be introduced first, to introduce and test the systems, followed by the full-scale introduction of the BIG, by about 2005/6

²²⁸ This number is highly inflated and is not what the Taylor Report estimated. BIG Financing Reference Group (2004) 37.

²²⁹ BIG Financing Reference Group (2004) 37.



constraints...” and there was no engagement with the economists who did the calculations for the Taylor Committee.²³⁰

The BIG Coalition argues that BIG is affordable in the short term and over time poverty levels will decrease and this will diminish the burden on the fiscus. The BIG Coalition did manage to get some explanation from “those responsible in government”.²³¹ First there is a fear to giving in to a “populist demand”, which would put pressure on the government to increase the grant and this would result in an “open-ended fiscal exposure”.²³² The second point was that this would “open the floodgates for other major new areas of expenditure”. The example given was the demand that government provide anti-retrovirals for those living with HIV.²³³ The second part has been implemented thanks to the *Treatment Action Campaign case*²³⁴ as well as mobilising the masses. It illustrates that something once seen as a potential burden has assisted South Africans.

4.7. Financing the Basic Income Grant

While investigating the cost of the BIG the Taylor Committee found that we should differentiate between the “gross burden” and the “net burden” of the BIG. To add R100 to the existing grants already being supplied to people could amount to R46 billion, but there was evidence given that R22 billion of this amount could be recuperated back through the tax system resulting in the net funds needed being R24 billion.²³⁵ The Taylor Committee heard arguments that if the BIG was funded using increased VAT rate, the net burden would be 13,5 billion.²³⁶ Due to the reason that “tax increases did

²³⁰ Attempts were made by the BIG Coalition to set up a meeting with the Minister and the economists who worked on the BIG – it proved fruitless. BIG Financing Reference Group (2004) 37-38.

²³¹ BIG Financing Reference Group (2004) 38.

²³² This was discussed at the 1998 Presidential Jobs Summit. BIG Financing Reference Group (2004) 39.

²³³ BIG Financing Reference Group (2004) 38.

²³⁴ *Treatment Action Campaign v Minister of Health and Others* 2002 (4) BCLR 356 (T).

²³⁵ The Taylor Committee Report (2002) 134.

²³⁶ The Taylor Committee Report (2002) 134.



not fall within the brief” of the Taylor Committee, the Taylor Committee steered clear of discussing taxation but found that “there is evidence of sufficient fiscal capacity for improved social sector spending without adverse macro-economic impacts”.²³⁷

COSATU²³⁸ on the other hand proposed that the grant would be generated from all low to middle income²³⁹ earners while implementing a “solidarity tax” for higher income earners. COSATU noted that *“it is the employed workers who provide the social security net for the unemployed. ...given the absence of a publicly-funded welfare net in South Africa, workers provide accommodation, food and other help to the unemployed family members”*.²⁴⁰

COSATU noted the relationship between the BIG and existing grants and realised that the BIG could be either be given on top of existing grants or it could be offset against them. Other proposals have focused on the Value Added Tax (VAT) system as well as progressive taxation.²⁴¹

The BIG Financing Reference Group commissioned their own economists²⁴² to look into the financing of the BIG.²⁴³ Each economist approached the problem uniquely and investigated alternative financing options. They worked closely together and had the opportunity to interrogate the important aspects of their research.²⁴⁴

²³⁷ Matisonn & Seekings “Welfare Wonderland? The politics of Basic Income Grant in South Africa, 1996-2002” 9th International Congress Geneva, September 12th -14th (2002), 14

²³⁸ COSATU Submission on Comprehensive Social Security Submitted to the Taylor Task Team of Social Security, December 2000. [Online] Available from: www.cosatu.org.za/show.php?!ID=831 (sourced 17 November 2018)

²³⁹ The Taylor Committee Report (2002) 61.

²⁴⁰ Matisonn & Seekings (2002) 22.

²⁴¹ The Taylor Committee Report (2002) 61

²⁴² The Economic Policy Research Institute; Professor Pieter le Roux; Professor Charles Meth & Dr Ingrid Woolard. BIG Financing Reference Group (2004) 42-46.

²⁴³ BIG Financing Reference Group (2004) 41.

²⁴⁴ BIG Financing Reference Group (2004)41.



Due to limitations I am not equipped to go into detail about how the BIG would be funded or whether it should be given over and above existing grants or it would be for the base of existing grants. I am of the view that as long as those already receiving grants do not receive less than they were receiving that would be constitutionally compliant. The important issue raised in this mini-dissertation is that we need to include those currently excluded from the social security system, into the social security system. In that way we will have a comprehensive and sustainable social security system.

4.8. Conclusion

After discussing the debates for and against the BIG I am of the view that the Basic Income Grant is a suitable way to realise section 27(1)(c) of the Constitution. When you think of the term vulnerable it is easy to think of children, the elderly and the disabled but unemployed individuals aged 18 to 59 are also vulnerable. One step we could utilise in the road to realising this right is to use the strategy adopted in the *Treatment Action Campaign* case which include rapid societal mobilization, while taking the government to court. This strategy yielded unprecedented results.

The current social security system discriminates unfairly against those it excludes namely: Women and men without children, between the ages 19 to 59 years, who do not have a disability, who have never been formally employed or had formal employment that had the benefit of UIF and have never regained employment post the UIF. These factors somehow do not resonate a sense of urgency within those in charge.

We cannot be surprised that we have so much crime, or that the perpetrators of crime are young, able bodied men and women of all races, but particularly of the black and coloured community. These communities were the most marginalised during apartheid and continue to be in the new democracy, because life has changed for some and not for many others.

By introducing the BIG, we would be realising a constitutionally entrenched right, while also facilitating job creation the BIG would promote self-employment and the starting



of small businesses which would improve the economy in rural and township areas where there is very little economic activity.



Chapter 5 - Socio-Economic Rights Adjudication – Case Law

5. Introduction

In this chapter I look at socio-economic rights adjudication in South Africa and the role of transformative constitutionalism as a tool to facilitate the realisation of socio-economic rights. I shall briefly look at the different role players and the duty they play in realising these rights for South Africans and I also discuss the importance of the *Grootboom*²⁴⁵ case and its impact on socio-economic rights adjudication.

“The inclusion of socio-economic rights in the Constitution represented the culmination of a process of struggle to recognise the socio-economic dimensions of human dignity, freedom and equality... Socio-economic rights were regarded as crucial to an integrated, holistic Bill of Rights which would reflect the needs and aspirations of all groups in South Africa... The inclusion of socio-economic rights were regarded as crucial to facilitating the fundamental transformation of South African society.”²⁴⁶

The South African Constitution provides a legal framework within which to redress the injustices of the past as well as to facilitate the creation of a more just society in the future.²⁴⁷ As illustrated by the quote above, the inclusion of socio-economic rights in the Constitution as fully justiciable rights, shows the Constitution’s transformative vision.²⁴⁸

5.1. The role players

5.1.1. Organs of State

Organs of state represent the state and means any department of state or administration in the national, provincial or local sphere of government; or any other

²⁴⁵ *Government of the Republic of South Africa v Grootboom* 2001 SA 46 (CC).

²⁴⁶ Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 21-22.

²⁴⁷ Liebenberg (2010) 25.

²⁴⁸ Currie & De Waal *The Bill of Rights Handbook* (2013) 564.



functionary or institution – exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public duty in terms of any legislation.²⁴⁹ The state has the duty ‘to respect, protect, promote and fulfil the rights in the Bill of Rights.’²⁵⁰

The realisation of the different socio-economic rights falls under the different state departments.²⁵¹

5.1.2. Chapter Nine Institutions

The Constitution established state institutions supporting constitutional democracy. These include: The Public Protector;²⁵² the South African Human Rights Commission;²⁵³ the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;²⁵⁴ the Commission for Gender Equality;²⁵⁵ the Auditor-General²⁵⁶ and the Electoral Commission.²⁵⁷ They are independent and are subject only to the Constitution and the law. These institutions are there to hold the organs of state and others accountable.

5.1.3. The Courts

Section 39 of the Constitution requires that courts promote the spirit, purport and objects of the Bill of Rights, when interpreting legislation.²⁵⁸

²⁴⁹ Hoexter *Administration in South Africa* (2012) 206.

²⁵⁰ Section 7(2) of the Constitution of the Republic of South Africa, 1996.

²⁵¹ For example, the social assistance falls under the Department of Social Development. The Department of Social Development created SASSA the South African Social Security Agency to administer social grants.

²⁵² Section 182 of the Constitution of the Republic of South Africa, 1996.

²⁵³ Section 184 of the Constitution of the Republic of South Africa, 1996.

²⁵⁴ Section 185 of the Constitution of the Republic of South Africa, 1996.

²⁵⁵ Section 187 of the Constitution of the Republic of South Africa, 1996.

²⁵⁶ Section 188 of the Constitution of the Republic of South Africa, 1996.

²⁵⁷ Section 181 of the Constitution of the Republic of South Africa, 1996.

²⁵⁸ Section 39(2) of the Constitution of the Republic of South Africa, 1996.



The Courts represent the judicial branch of government. They are in charge of adjudicating the law.

“The status of socio-economic rights as justiciable rights in the South African Constitution vests in the judiciary an important role in interpreting these rights.”²⁵⁹ The courts are constitutionally obligated to consider claims based on these rights seriously and to develop new and innovative remedies if a breach of the relevant provisions in the Bill of Rights is established.

Section 34 and 38²⁶⁰ of the Constitution of the Republic of South Africa cement the point that if your socio-economic rights are being violated, you must approach the courts. Both the above constitutional provisions illustrate the point that the courts are the ones that adjudicate matters of infringement of all rights- including socio-economic rights.

“Transformative constitutionalism” is the vehicle with which we use to achieve social change. The transformation is facilitated and can only be done within the constraints of the Constitution.²⁶¹

There is a down side to having socio-economic rights solely adjudicated by the judiciary. The courts have the potential to expand on socio-economic rights or do the opposite and actually limit and bring about a regression of these rights.²⁶²

Liebenberg has stated the various ways this can come about. Namely:

²⁵⁹ Liebenberg (2010) 37

²⁶⁰ Section 34 of the Constitution of The republic of South Africa, 1996. “*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*”.

Section 38 of the Constitution “Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights”.

²⁶¹ Liebenberg (2010) 34.

²⁶² Liebenberg (2010) 39.



“(1) the courts could interpret them narrowly and exclude certain needs from the scope of the relevant provision; the courts can undermine popular struggles to have these needs recognised and affirmed in the broader political discourse.²⁶³ (2) The adjudicative culture and practices operate to reinforce the public/private dichotomy by imposing strong duties of accountability on public actors for meeting socio-economic rights claims, while imposing weak or non-existent standards of accountability on private institutions.²⁶⁴ (3) The appearance of inevitability and normality generated by such interpretations can divert attention from the limited range of meanings generated by legal processes and interpretive communities with the result that judicial interpretations of the rights are insulated from a broader transformative critique.²⁶⁵ (4) The adjudication can thus operate to prevent a serious consideration of alternative interpretations of socio-economic rights in wider political discourse that may better advance the transformative purposes of the Constitution.²⁶⁶

An approach premised on the courts possessing all the answers on how best to realise socio-economic rights, can also have negative repercussions for democratic transformation.²⁶⁷

By the time people approach the courts, they have exhausted all other avenues with the relevant organ of state. They have had to approach lawyers and they cost money, if they are lucky they are assisted by an NGO on a pro-bono basis. This I have stated to illustrate the difficulty of accessing justice as an ordinary unemployed individual.

With all that said, the above does not take away the constitutional responsibilities of the other branches of government - the fact that the Constitution gives them a mandate to realise socio-economic rights.

²⁶³ Liebenberg (2010) 39.

²⁶⁴ Liebenberg (2010) 39.

²⁶⁵ Liebenberg (2010) 39.

²⁶⁶ Liebenberg (2010) 39.

²⁶⁷ Liebenberg (2010) 40.



5.2. Transformative Constitutionalism

Defining transformative constitutionalism can be tricky, due to the fact that many define transformative constitutionalism differently,²⁶⁸ but there are certain key features that stick out.

The former Chief Justice Pius Langa of the Constitutional Court, understands transformative constitutionalism as what is written in the Epilogue of the Interim Constitution, which states:

“a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”²⁶⁹

Karl Klare defines it as:

“[A] long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale change through nonviolent political processes grounded in law.”²⁷⁰

I prefer these definitions; as they illustrate the importance everyone being responsible for righting the wrongs of our past to build a future we can all enjoy.

²⁶⁸ Mashele Rapatsa “Transformative Constitutionalism in South Africa: 20 Years of Democracy” 2014 *Mediterranean Journal of Social Sciences* 887; Van Marle “Transformative Constitutionalism as/and Critique” 2009 *Stell LR* 2; Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 23; Klare “legal culture and transformative constitutionalism” 1998 *SAJHR* 150.

²⁶⁹ Pius Langa “Transformative Constitutionalism” 2006 *Stell LR* 352.

²⁷⁰ Liebenberg (2010) 24.



I am of the view that we need to change the way we view socio-economic rights, as though they are subservient in nature. We need to get to a point where despite our different socio-economic backgrounds, everyone's right to human dignity is respected and everyone enjoys a decent life and we do not have people living below the poverty line.

Langa then states that the new society is one based on substantive equality. To illustrate the movement from one side of the bridge to the other, he references Albertyn and Goldblatt²⁷¹ where they state that movement from one side to the other will:

“Require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination and material disadvantages based on race, gender, class and to her grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships”²⁷²

We need to view the bridge as a space between the unstable past and our uncertain future, preferring neither of them, because the value of the bridge lies in remaining on it and “crossing it over and over to remember, change and imagine new and better ways of being”.²⁷³

Chief Justice Langa states that there is a need for economic transformation and the transformation of the legal culture - for legal culture to move “from a culture of authority to a culture of justification”.²⁷⁴ Judges need to accept the politics of law, they cannot

²⁷¹ Albertyn & Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” 1998 *SAJHR* 248.

²⁷² Albertyn & Goldblatt 1998 *SAJHR* 248 – 249.

²⁷³ Van Marle notes the contribution of Andre van der Walt in highlighting Karl Klare's statement of the need to have “a new imagination” when utilising transformative constitutionalism because trying to fit it into the existing notions of law can prove difficult. Van Marle “transformative constitutionalism as/and critique” 2009 *Stell LR* 288.

²⁷⁴ Langa 2006 *Stell LR* 353.



assert that the law can be kept isolated from politics.²⁷⁵ There are challenges to adjudicating socio-economic rights in a transformative constitutional way.²⁷⁶ For example, there will be individuals whose rights may need to be limited in order to realise the right to socio-economic rights of others. Courts will have to weigh up individual's right versus the rights of the broader society.

The Constitution does not provide a comprehensive blueprint of how to achieve a transformed society. It merely provides a set of institutions, rights and values for guiding and constraining processes of social change.²⁷⁷

From the above, my understanding of transformative constitutionalism is that it is a bridge that takes us from our traumatic past and into the future we all deserve. Getting to the other side is important but remaining on the bridge gives us more rewards, because while we are on the bridge, we consciously and actively make sure that we contribute positively in our society and the Constitution helps us make sure that we leave no one behind. We are willing to make sacrifices²⁷⁸ in order to realise the rights of everyone.

With this realisation I shall discuss the *Grootboom* case as the blueprint not taking for granted the fact that there have been various other cases that have come after *Grootboom* and even went further than the *Grootboom* case.

²⁷⁵ Langa 2006 *Stell LR* 353.

²⁷⁶ Liebenberg (2010) 24, 29.

Such as "challenging the classic liberal conceptions of constitutional rights" and also "understanding the doctrine of separation of powers, which is based on rigid functional demarcations between the three spheres of government". According to Liebenberg, many in the legal culture of South Africa reinforce these classic liberal views of constitutional rights and judicial review. She points out that until judges, lawyers and NGOs involved in socio-economic rights litigation are conscious of the strictures and dichotomies that pervade classical liberal constitutional theory and are able to imagine alternative conceptions, the transformative potential of socio-economic rights will not be realised.

²⁷⁷ Liebenberg (2010) 29.

²⁷⁸ Private rights may need to be sacrificed in order to achieve equality.



5.3. Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)

Grootboom is important in illustrating the importance of and the equal weight that socio-economic rights have. All rights in the Bill of Rights are equal, but at times some rights are more equal than others.²⁷⁹ This case sees the Constitutional Court illustrating the equal importance of a socio-economic rights as justiciable rights and that budgetary constraints are no excuse for not implementing these rights.²⁸⁰

Brief summary of the facts

Ms Grootboom was part of a group of people who were living in appalling conditions in Wallacedene Western Cape. A quarter of the households of Wallacedene had no income at all, while more than two thirds earned less than R500 per month. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. Because of these reasons she and other residents decided to move from Wallacedene illegally occupy a vacant land that belonged to a private.²⁸¹

The owner of that private land then obtained an ejectment order against the illegal dwellers from the magistrates' court and it was granted. Ms Grootboom and the other respondents became homeless as a result of being evicted from their informal homes that they built on that private land. *"The eviction happened prematurely and inhumanely on a cold, windy and rainy day. It was reminiscent of apartheid-style eviction. Their homes were bulldozed and burnt and their possessions destroyed, many residents who were absent could not even salvage their personal belongings."*²⁸²

The respondents then went to settle on the Wallacedene sports field under temporary structures that they made with the materials they could find. The rains started and the shelters proved too weak to protect them. The respondent's attorney wrote a letter to

²⁷⁹ Similar to the phrase from George Orwell's *Animal Farm* – "All animals are equal, but some are more equal than others". Chapter 10 page 112.

²⁸⁰ *Government of The Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 20.

²⁸¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 3 & 8.

²⁸² *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 10.



the municipality describing the conditions that they were living under and demanded that the municipality meet its constitutional obligations.²⁸³

The respondents were unhappy with the response of the municipality, so they brought an urgent application to the high court requiring government to provide adequate basic shelter or housing for them, until they obtained permanent accommodation. The court granted this relief.²⁸⁴

The state was ordered by the High Court to provide the shelter for the respondents and their children. The judgment provisionally concluded that “tents, portable latrines and a regular supply of water (which would be transported) would constitute the bare minimum’. The appellants responsible for housing challenged the correctness of that order.²⁸⁵

The appeal reached the Constitutional Court. The court reiterated the fact that socio-economic rights are expressly included in the Bill of Rights; and they cannot be said to exist on paper only.²⁸⁶

The Constitution Court decided that the Governments’ housing programme did not comply with the obligation to take reasonable steps (section 26(2)). In order to get to this point the Constitutional Court developed a standard of reasonableness as a guide to decide if the Government’s programme meets constitutional requirements. Khoza²⁸⁷ summarised the Court’s standards as follows:

- It must clearly allocate responsibilities and tasks to the different spheres of government, and ensure that financial and human resources are available.²⁸⁸

²⁸³ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 11.

²⁸⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 4.

²⁸⁵ *Government of the Republic of South Africa v Grootboom supra*.

²⁸⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 20.

²⁸⁷ Khoza *Socio-Economic Rights in South Africa* (2007) 31-32.

²⁸⁸ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 39.



The constitution allocates different powers to the different spheres and requires them to co-operate to fulfil its obligations. Housing falls in the domain of the national and provincial government. The duty of the local government is to make sure that services are provided in a sustainable way.²⁸⁹

- The programme must be comprehensive, coherent and coordinated.²⁹⁰

All three spheres of government need to come together and agree to which task each sphere will do. National government creates the legislative framework which all the spheres must adhere to and makes sure that the obligations of section 26 and that framework can, and are met.²⁹¹

- It must be capable of “facilitating the realisation of the right”.²⁹²

The direction of the programme is to progressively realise the right within the state’s available resources. The measures adopted must be reasonable. The court looks at the current measures in place and states whether they are reasonable or not.²⁹³

- It must be reasonably formulated and implemented.²⁹⁴

The court does acknowledge that “legislative measures by themselves are not likely to constitute constitutional compliance”.²⁹⁵ Law on its own is not enough and it has to be supported by “well-directed policies” that must be “formulated” and “implemented” reasonably.²⁹⁶

²⁸⁹ *Government of the Republic of South Africa v Grootboom supra.*

²⁹⁰ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 40.

²⁹¹ *Government of the Republic of South Africa v Grootboom supra.*

²⁹² *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 41.

²⁹³ *Government of the Republic of South Africa v Grootboom supra.*

²⁹⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 42.

²⁹⁵ *Government of the Republic of South Africa v Grootboom supra.*

²⁹⁶ *Government of the Republic of South Africa v Grootboom supra.*



- It must be balanced and flexible, and appropriately provide for short-, medium- and long-term needs.²⁹⁷

It is important when determining reasonableness to take into consideration the “social, economic and historical context” and to take into consideration the “capacity of the institutions responsible for implementing the programme”.²⁹⁸ “A programme that excludes a significant segment of society cannot be said to be reasonable.”²⁹⁹ Due to the fact that circumstances are always changing, the programme must be reviewed frequently to be applicable to the changing times.³⁰⁰

- It must provide for the needs of those most desperate by providing relief for people who have no access to land, no roof over their heads, and who are living in intolerable or crisis situations.³⁰¹

Reasonableness must take into account the context of the whole Bill of Rights. The right is entrenched because “we value human beings and want to ensure that they are afforded their basic human needs”.³⁰² To be reasonable, the “measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise”.³⁰³ The Constitution requires that everyone be treated with “care and concern”, meaning, if the measures are statistically successful, but “fail to respond to the needs of those most desperate”, those measures may not pass the test.³⁰⁴

The Court developed an approach to interpreting socio-economic rights, namely: these rights must be understood and interpreted in our historical and social context; and

²⁹⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 43.

²⁹⁸ *Government of the Republic of South Africa v Grootboom supra*.

²⁹⁹ *Government of the Republic of South Africa v Grootboom supra*.

³⁰⁰ *Government of the Republic of South Africa Grootboom supra*.

³⁰¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 44.

³⁰² *Government of the Republic of South Africa v Grootboom supra*.

³⁰³ *Government of the Republic of South Africa v Grootboom supra*.

³⁰⁴ *Government of the Republic of South Africa v Grootboom supra*.



when looking at the historical context, the court may consider the current barriers to access to services and vulnerability of specific groups, such as children, women and the elderly.³⁰⁵

The Court dealt with the term of progressive realisation, stating that although it was foreseen that the right would not be realised immediately, the Constitutional goal is that all of society's basic needs must be met and the "state must take steps to achieve this goal". "Housing must be made more accessible not only to a larger number of people but to a wider range of people" as time goes on.³⁰⁶

The Court found that the obligation to take the required measures does not require the state to do more than its available resources, meaning the content of the obligation as it relates to the rate that things are achieved at, as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.³⁰⁷

Taking in to account my previous chapter 3, I need to make a brief comparison.

Both the ICESCR and the Constitution refer to the concepts of "*taking legislative measures*", "*progressive realisation*", and the "*limits of available resources*".³⁰⁸

The Constitutional Court in *Grootboom*, took note of the fact that there were differences in the formulation of the relevant provisions, and that these differences were "*significant in determining the extent to which the provisions of the covenant may be a guide to an interpretation of section 26*".³⁰⁹ The court highlighted the following differences in relation to the right to housing:³¹⁰

³⁰⁵ Khoza *Socio-Economic Rights in South Africa* (2007) 33.

³⁰⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 45.

³⁰⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 46.

³⁰⁸ Liebenberg (2010) 107.

³⁰⁹ *Government of the Republic of South Africa v Grootboom* 2001 SA 46 (CC) at para 28.

³¹⁰ *Government of the Republic of South Africa v Grootboom* supra.



- (a) The Covenant provides for a *right to adequate housing* while s 26 provides for the right of access to adequate housing.
- (b) The Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures.

These differences were raised by the court when declining the argument that s 26 should be interpreted to incorporate the concept of ‘minimum core obligations’³¹¹ endorsed by the UN Committee on Economic, Social and Cultural Rights. In The *Grootboom* case the amici curiae broadened the issues before the court to include a consideration of s 26 of the Constitution.³¹² They argued that s 26 (1) and (2) imposes a minimum core obligation on the state to ensure that those who are truly homeless and in crisis receive some rudimentary form of shelter. The state has a burden to demonstrate that it has prioritised its resources to satisfy this minimum core obligation. As mentioned above, the court dismissed this point.

I now believe that because we have ratified the ICESCR, we are bound to its obligations and cannot merely view it as a guide. Had *Grootboom* been adjudicated after the ratification, the issue of minimum core obligations would not have been dismissed.

³¹¹ The UN Committee on Economic, Social and Cultural Rights describe the concept of minimum core obligations as follows:

“On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant... 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 at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”

³¹² *Government of the Republic of South Africa v Grootboom* para 18.



5.4. Application of the standard of reasonableness developed in the *Grootboom* case to the right to social assistance for all or a Basic Income Grant

5.4.1. It must clearly allocate responsibilities and tasks to the different spheres of government, and ensure that financial and human resources are available.

Unemployed people aged between 18 years and 59 years are completely excluded from the social assistance system. Some are partially “catered” for in the social security system,³¹³ for example, a person who was formally employed and contributed to the Unemployment Insurance Fund can claim from it once they are retrenched. If they get injured at work, they receive money from the Compensation Fund. In both the above examples the person aged between 18 and 59 years has to have been working first and also contributes to these funds as mandated by the laws governing labour.

If you were never employed or if you were employed informally, you cannot benefit from the above. As mentioned in the previous chapters it is assumed that everyone between 18 and 59 years of age is or will be employed.

That is why they are not catered for in the non-contributory poverty alleviating – social assistance. They are deemed not deserving of such assistance because they are not part of the “vulnerable”. The rhetoric by government is “jobs for all”, but the rate at which these jobs are being created cannot even meet a quarter of the demand. I believe that this continued practice actually makes them vulnerable. It increases the vulnerability of women as well as makes both men and women susceptible to criminal activity.

5.4.2. The programme must be comprehensive, coherent and coordinated.

The Social Security Act 13 of 2004 which is the enacted legislation excludes people aged 18 to 59 years.³¹⁴ It achieves this through the definition of social assistance. It

³¹³ The UIF is supposed to assist them until they find alternative employment. If it runs out and they have not found alternative employment there is nothing they can do.

³¹⁴ For example, if a person aged 18 – 59 years, (1) is never employed; or (2) is employed and loses their job and cannot secure employment thereafter; (3) is not a parent of a child; (4) is not a foster parent; and (5) does not have a disability, such person will not be able to even indirectly access social assistance.



defines what “social assistance” by merely stating the categories of people who can benefit from the grants.³¹⁵

5.4.3. It must be capable of “facilitating the realisation of the right”.

The Social Security Act as it stands is incapable of awarding grants to persons aged between 18 and 59 years because expressly excludes them. Unless it is amended, it denies the right to social security to those who also have a Constitutional right to it. As seen from the government policies “handouts” to the unemployed should be avoided.³¹⁶ This illustrates the point that we do not see this as a right but as a favour and we use legislation to undermine it.³¹⁷

5.4.4. It must be balanced flexible, and appropriately provide for short-, medium- and long term needs.

The Social Security Act excludes a large part of society, so it fails to meet the reasonableness test. The historical context of poverty is known and somewhat acknowledged. That is why job creation is always part of all political campaigns³¹⁸. The problem is that the government only sees job creation as a solution, even though the Constitution itself states that “everyone has the right to social assistance”.³¹⁹ The programme as I foresee will remain static and will not be reviewed to include these people as beneficiaries.

³¹⁵ Sections 1 and section 6 – 13. Children from birth up until the age of 18 years; Elderly people only when they reach the age of 60 years old receive the Older Persons Grant; Children in foster care, the Foster Care Grant is given to the care givers of these children; Children with a disability, their caregivers receive the Care Dependency Grant in order to be able to take care of them; Persons (adults) with a disability, receive the Disability Grant; People who were in the military and war, over the age of 60 years receive the War Veterans Grant; Grant-in aid, is given to people with mental or physical conditions that require someone else to look after them; Social Relief of Distress, given to people affected by a disaster or when a breadwinner has died or has been admitted into an institution.

³¹⁶ Paragraph 2.3.3 Redistribution and Development Plan.

³¹⁷ Fombad “An overview of the Constitutional Framework of the Right to Social Security with Special Reference to South Africa” 2013 *African Journal of International and Comparative Law* 11

³¹⁸ African National Congress’ 2014 Election Manifesto 11 January 2014

³¹⁹ Their rhetoric suggests that social assistance for people aged 18 to 59 years would be unfathomable as these people can go out and work. They cannot receive “handouts”.



5.4.5. It must clearly allocate responsibilities and tasks to the different spheres of government and ensure that financial and human resources are available.

The problem with realising the right to social assistance for people aged 18 to 59 years, is that the relevant stakeholders are ignoring the fact that these people have a constitutional right to social assistance. It is difficult to get financial and human resources into something when the people in charge don't believe that it should even happen.

5.4.6. It must be reasonably formulated and implemented.

There are no provisions in the enacted legislation referring to social assistance for person aged 18 to 59 years. The public works programmes have also failed to bring about significant change.

5.4.7. It must provide for the needs of those most desperate by providing relief for people who have no access to land, no roof over their heads, and who are living in intolerable or crisis situations.

The Social Security Act fails to provide for the needs of the people aged 18 to 59 years, who are living in intolerable, crisis situations. In South Africa, whole families are living off the Child Support Grant or the Older Person's Grant, if they are lucky enough to have a person in the family who qualify for a specific grant.

5.5. Are courts applying judicial deference when adjudicating?

This goes hand in hand with doctrine of separation of powers. There is a fine line that judges always have to be on the lookout for, it is between judicial deference and the judiciary not overstepping into the terrain of the other branches of government. The doctrine of separation of powers has the potential to frustrate transformation when it assumes an idealised form of strictly demarcated separate spheres of government, instead of assuming the role that is functional and pragmatic and that is responsive and facilitates accountable governance.³²⁰

³²⁰ Liebenberg (2010) 66. In its rigid form, separation of powers doctrine may be applied by courts as a way to avoid having to interpret and enforce the constitutionally guaranteed rights.



There is no clear cut way of adjudicating socio-economic rights. This is clearly visible in how the courts have interpreted them.³²¹ In the *Soobramoney*,³²² a case that dealt with the right to health care, the Constitutional Court decided against him and stated that his claim did not fall under “emergency medical treatment”, because his case “was not a sudden unexpected catastrophe but an ongoing need for medical treatment to live longer”.³²³ The court found that the conduct of the hospital in determining who gets dialysis treatment was fairly and rationally applied, that the right to health care services is limited by the availability of resources³²⁴ and that a court “would slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibility it is to deal with such matters”.³²⁵ In this case the court applied judicial deference and failed to engage with the contents of the right of access to health care services. The court instead focused on the budgetary limitations.³²⁶

5.6. Conclusion

The right to social assistance for all is not being realised. I believe that a Basic Income Grant can be the solution for this. The enacted legislation fails the reasonableness review by excluding a whole category of impoverished people who have a constitutional right to social assistance.

If courts follow judicial deference and refrain from “encroaching in the domain” of the other branches of government, because of budgetary constraints, they would be doing the Constitution as well as the millions of people in South Africa, living below the poverty line, a huge disservice. The courts would be confirming that some people’s

³²¹ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and others* (2008) (3) SA 208 (CC) & *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* (2011) (7) BCLR 723 (CC).

³²² *Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC)*.

³²³ Khoza (2007) 31.

³²⁴ Khoza (2007) 31.

³²⁵ *Soobramoney v Minister of Health, KwaZulu-Natal 29*.

³²⁶ Liebenberg (2010) 139.



rights are more important than other people's rights and that the cycle of poverty can never be broken "due to budgetary constraints".

If we follow the constitutional transformative route that seeks to promote the right to human dignity and equality by redressing the legacy of the past. We will redress and heal the divisions in our society caused by colonialism and apartheid policies. We will have more unity and all of our citizens will be protected. Nobody will have to turn to crime as the only means of staving off hunger and death. This action will show all South Africans that the Constitution is a living document guarantees the same rights for all. We do have the resources to make this happen³²⁷, we just need to get the government and people to be willing to make those resources available.

³²⁷ Khoza (2007) 135.

According to Khoza, South Africa is a relatively well-off middle-income country, with vast wealth. The resources are available to provide everyone with at least a basic level of the socio-economic rights we are entitled to.



Chapter 6

6. Conclusion

The new era of human rights protection, democracy and constitutionalism will only make sense and have meaning for the ordinary citizens when the constitution is seen to address in a meaningful and effective way the pressing issues of poverty, access to health care and other forms of social security needs that directly address the concerns of the poor and needy and also tries to close the ever widening gap between the rich and the poor. No region of the world presently endures the severe disparities between people's rights and their realisation that occurs in Africa. The hope is that constitutionally entrenched rights within the framework of a legally enforceable Bill of Rights will bring pressure to bear on African governments to deal with the growing social security needs. A rights-based approach to social security is more likely to be effective than an approach that allows the State to act on the basis of compassion or humanitarianism. It will also enable states to comply with the numerous international and regional frameworks that many of them have ratified.³²⁸

This quote by Fombad echoes my stance on the issue of poverty alleviation and creating a fair and just society, where we value our human rights especially the right of people to live dignified lives.

I have argued that section 27(1)(c) of the Constitution is not being fully realised. Those entitled to social assistance because they cannot take care of themselves or their dependents, do not have access to it. The reason for this is seemingly ideological and 'we cannot afford it'. In order to avoid becoming a "welfarist" state the government purposefully avoids giving individuals who are between the ages of 18 – 59 years, social assistance. The government's quest to not be a "welfarist" state comes at the

³²⁸ Fombad "An overview of the Constitutional Framework of the Right to Social Security with Special Reference to South Africa" 2013 *African Journal of International and Comparative Law* 31. [Online] Available at [https://repository.up.ac.za/bitstream/handle/2263/21961/Fombad_Overview\(2013\).pdf?sequence=1](https://repository.up.ac.za/bitstream/handle/2263/21961/Fombad_Overview(2013).pdf?sequence=1) sourced on 17 October 2018.



cost of many South Africans. Our social security system has a gap and adult individuals, aged between 18 & 59 years, who are unemployed fall through that gap. Section 27(2) states that the right is not immediately realisable and subject to available resources, it facilitates the reluctance to implement universal social assistance. even the enacted legislation, which is supposed to realise the right to social assistance to all who need it, is flawed. By not including adult unemployed able-bodied individuals who cannot take care of themselves or their dependents, in the definition of social assistance in the Social Assistance Act, means that they such individuals are excluded from receiving any form of social assistance.

The South African Constitution is in line with law at international and regional level. There are provisions and measures for adult individuals, who are unemployed and cannot secure employment, that need social assistance. I have explained in the previous chapter that having recently ratified the ICESCR, it no longer serves as a “guideline” only, South Africa is actually bound by its provisions and should adhere to them as a country and will need to explain to the treaty body why they have not realised this right, while so many South Africans suffer. The UDHR also with its status as international customary law means that we are bound to it, as long as it does not clash with our domestic law. I have explained the importance of the *Grootboom* case and the importance thereof. It relied greatly on the ICESCR and South Africa was only a signatory member. We have now ratified the ICESCR and it carries even greater weight because we are bound to it.

I have argued that the Basic Income Grant would be one of a tool that would help solve the problem of facilitating social security for all those who need it, as envisaged in our Constitution. By it being universal and not means tested, the BIG would cost less than our current grants to implement administratively and would leave very little room for government bureaucracy. The BIG would be given to all citizens and people who are permanent residents and refugees, all people legally in the country. It would be financed through different streams, which some examples have been briefly mentioned. I reiterate that I am looking at BIG through a constitutional lens and state that it can be used as a tool to realise social assistance for all, and by default, those who need it. The BIG would significantly reduce poverty and it would facilitate self-determination as individuals would rely on themselves to be able to look after



themselves. The BIG would also be developmental in that it would allow individuals to be able to feed themselves and their families, it would allow them to start small business, in order to get additional incomes and an important indirect outcome to this would be that the burden to assist the impoverished would fall less on those deemed “the working poor” and it would lessen black tax on young adults. The BIG would also facilitate social cohesion between all South Africans, some have argued that it could be viewed as reparations as envisaged in the TRC. For me, it would mean that All South Africans from all backgrounds (be it socio-economically or racially) are active in trying to create a society we can all live in and be happy in. The government has an important role to play in getting South Africa to this point, but we often seem to forget the private sector. The government itself treats the private sector as an entity that can simply “opt-in” or out of building a South Africa that is socially cohesive. We all as South African’s bear this responsibility. In order for all of us to live a fulfilled and joyful life we have to make sure that we leave no one behind, that no person lives beneath the poverty line. Everyone must have a decent life and the BIG would help create that.



BIBLIOGRAPHY

Books

BIG Financing Reference Coalition (2004) *“Breaking the poverty trap”: Financing a Basic Income Grant in South Africa* Cape Town: BIG Financing Reference Group.

Brand & Heyns (eds) (2005) *Socio-economic rights in South Africa* Pretoria: Pretoria University Law Press.

Bundy C (2016) *Poverty in South Africa Past and Present* Cape Town: Jacana.

Currie I & De Waal J (2013) *The Bill of Rights Handbook* Cape Town: Juta.

Dugard J (2012) *International Law. A South African Perspective 4th Edition* Cape Town: Juta.

Govindjee A (2009) *Social assistance as a framework for social policy in South Africa – the constitutional right to have access to social security as a framework for social policy in South Africa: Lessons from India* Germany: VDM Verlag Publishers.

Hoexter C *Administration in South Africa* (2012) Cape Town: Juta.

Khoza S (ed) (2007) *Socio-economic rights in South Africa (2007)* Cape Town: University of Western Cape.

Liebenberg S (2010) *Socio-economic rights adjudication under a transformative constitution* Cape Town: Juta.

Liebenberg S & Quinot G (2012) (eds) *Law and Poverty. Perspectives from South Africa and beyond* Cape Town: Juta.

Standing G & Samson M (2003) *A Basic Income for South Africa* Lansdowne: University of Pretoria Press.

Journal articles

Brand D “Judicial deference and democracy in socio-economic rights cases in South Africa” (2011) 3 *Stell LR* 870.



Fombad C “An overview of the Constitutional Framework of the Right to Social Security with Special Reference to South Africa” (2013) *African Journal of International and Comparative Law* 1-31.

Klare K “Legal culture and transformative constitutionalism” (1998) *SAJHR* 150

Langa P “Transformative Constitutionalism” (2006) *Stell LR* 352.

Liebenberg S “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” (2001) 17:2 *South African Journal on Human Rights* 232-257.

Michelman F “The Supreme Court, 1968 Term – Foreword: on protecting the poor through the fourteenth Amendment” (1969) 83 *Harvard Law review* 7.

Nyenti M & Mpedi LG “The impact of SADC social protection instruments on the setting up of a minimum social protection floor in Southern African countries” (2012) 15 *PELJ* 1.

Olivier M & Jansen van Rensburg L “Protecting and enforcement of the right to social assistance (2000) *African Journals Online* 88.

Rapatsa M “Transformative Constitutionalism in South Africa: 20 Years of Democracy” (2014) *Mediterranean Journal of Social Sciences* 887.

Ross T “The Rhetoric of Poverty: Their Immorality, Our Helplessness” (1991) 79 *Geo. L.J* 1499.

Sinclair J “Poverty: Giving meaning to the right to social assistance” (2012) 2 *STELL LR* 193.

The South African Human Rights Journal 10 (1994).

Van Marle K “Transformative Constitutionalism as/and Critique” (2009) *Stell LR* 2.

Working Papers

Seekings J & Matisson H (2010) *The continuing politics of basic income in South Africa* Working Paper No. 286. November 2010. Centre for Social Science Research.



Conference Papers

Matisonn H & Seekings J (2002) 'Welfare Wonderland? The politics of Basic Income Grant in South Africa, 1996-2002' *9th International Congress*, Geneva September 12th -14th, 14.

McCord A (2003) 'Public Works as a Component of Social Protection in South Africa' *Paper delivered to the Basic Income Grant Coalition National Conference*, Soweto 2 December 2003, 6.

Case Law

Government of South Africa v Grootboom 2001 1 SA 46 (CC)

Heads of Argument by the Community Law Centre (acting as amicus curiae) before the Constitutional Court in the *Government of South Africa v Grootboom* 2001 1 SA 46 (CC)

Minister of Health v Treatment Action Campaign 2002 5 SA 703 (CC)

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and others (2008) (3) SA 208 (CC)

Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others (2011) (7) BCLR 723 (CC)

Soobramoney v Minister of health, KwaZuu-Natal 1998 (1) SA 765 (CC)

Legislation

Constitution of the Republic of South Africa, 1996.

Social Assistance Act 13 of 2004



Government publications

Department of the Presidency 'Twenty Year Review South Africa 1994-2014.

Republic of South Africa. (1997) Ministry for Welfare and Population Development. 1997. White Paper for Social Welfare. Notice 1108 of 1997. Government Gazette, 386 (18166). Pretoria: Government Printers.

The Accelerated and Shared Growth Initiative (2004).

The Growth, Employment and Redistribution (Gear) Strategy 1996.

The National Development Plan (NDP) 2030.

The New Growth Path (NGP) (2010).

The Reconstruction and Development Programme (RDP) 1994.

International instruments

Declaration concerning the aims and purposes of the International Labour Organization (ILO), annex to the Constitution of the ILO, section III (f).

ICESCR, General Comment 19 (Thirty-ninth session, 2007) UN Doc. The right to social security (art. 9) E/C.12/GC/19.

International Labour Organisation (ILO) Declaration of Philadelphia of 1944.

International Labour Organisation (ILO) The Social Security (Minimum Standards) Convention No 102 Of 1952.

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).

The International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).

Universal Declaration of Human Rights (UDHR) of 1948.



Regional instruments

The African Charter on Human and Peoples Rights (ACHPR), 1981.

The African Union Declaration On Employment and Poverty Alleviation in Africa of 2004.

The African Youth Charter 2006.

The Charter of Fundamental Social Rights in SADC 2003.

The Code of Social Security in SADC.

Reports

COSATU (1996) “Submission on Social Welfare White Paper” Presented to the Department of Welfare and Population Development, 4 November 1996.

Taylor Committee Consolidated Report (2002) “Transforming the past- Protecting the future” Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa 61.

Internet sources

Africa Check: <https://africacheck.org/factsheets/factsheet-south-african-official-poverty-numbers/> (accessed 8 11 2018)

Global Basic Income Foundation (2012) “Growing Support for BI Worldwide” <http://www.globalincome.org/English/BI-worldwide.html> Dec 2012 (accessed 8 11 2018).

The Editors of Encyclopaedia Britannica “Coloured” —: <https://www.britannica.com/topic/Coloured> (accessed 25 10 2018).

Collins Dictionary: <https://collinsdictionary.com/dictionary/English/african> (accessed 25 10 2018).



Kate Wilkinson “FACTSHEET: South Africa’s official poverty numbers” 15 Feb 2018 <https://africacheck.org/factsheets/factsheet-south-africas-official-poverty-numbers/> (accessed 8 11 2018).

Lameez Omarjee “More than 50% of SA’s population is living in poverty” 22 August 2017. <https://www.fin24.com/Economy/more-than-50-of-sas-population-is-living-in-poverty-20170822> (accessed 16 September 2018).

Nechama Brodie “FACTSHEET: What is Poverty?” 12 March 2014. <https://africacheck.org/factsheets/factsheet-what-is-poverty/> (accessed 8 11 2018).

Nkosazana Ngwadla “The burden of Black tax” 2 March 2018 Fin24 <https://www.fin24.com/Money/the-burden-of-black-tax-20180309> (accessed 20 November 2018).

Staff Writer “South Africa crime stats 2018: everything you need to know” 11 September 2018 <https://businesstech.co.za/news/government/270689/south-africa-crime-stats-2018-everything-you-need-to-know/> (accessed 8 11 2018).

Statistics South Africa. 2018. *Quarterly Labour Force Survey – 2018*. Statistical Release P0211. 30 October. [Online] Available from: <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2018.pdf> (accessed 17 10 2018).

Statistics South Africa. 2018. *Mid-year population estimates – 2018*. Statistical Release P0302. 23 July. [Online] Available from: <http://www.statssa.gov.za/publications/P0302/P03022018.pdf>. (accessed 8 11 2018).

Statistics South Africa. 2018. Table 1: Inflation-adjusted national poverty lines for 2018, Statistics South Africa 3. [Online] Available from: <http://www.statssa.gov.za/publications/P03101/P031012018.pdf> (accessed 8 11 2018)

Statistics South Africa. 2018. <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf#page=20> (accessed 8 11 2018)



Statistics South Africa. (2018) Poverty lines.

<http://www.statssa.gov.za/publications/P03101/P031012018.pdf> (accessed 8 11 2018).

Statistics South Africa. 2017. *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015*. Report no. 03-10-06 [Online] available from: <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf>. (accessed 16 09 2018).

Streak JC (2004) the gear legacy: did gear fail or move South Africa forward in development? *Development Southern Africa*, 1 October 2010 < www.tandfonline.com/doi/abs/10.1080/0376835042000219541> (accessed 10 11 2018).

“The world’s most unequal countries”:

<https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worlds-most-unequal-countries> (accessed 16 11 2018).

The World Bank “Upper middle income” : <https://data.worldbank.org/income-level/upper-middle-income> (accessed 27 10 2018).

The World Bank:

<http://databank.worldbank.org/data/reports.aspx?source=2&series=SI.POV.GINI&country=#> (accessed 10 10 2018).

Trade economics “Unemployment rate” <https://tradingeconomics.com/south-africa/unemployment-rate>. (accessed 2 09 2018).

University of Johannesburg “Are you part of the missing middle?” News24 25 July 2016 <https://www.news24.com/PartnerContent/are-you-part-of-the-missing-middle-20160715> (accessed on 20 November 2018).

Wits University Press “#FeesMustFall: the poster child for the new forms of struggle in South Africa?” 21 November 2016 *The Conversation*

<https://theconversation.com/feesmustfall-the-poster-child-for-new-forms-of-struggle-in-south-africa-68773> (accessed 20 November 2018).