

**A LEGAL ANALYSIS OF THE FEASIBILITY OF A BASIC INCOME
GRANT IN SOUTH AFRICA**

by

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Dedication

To my grandfather, Amos Mokgobi Kgaphola *Kanyane*, for being my greatest pillar.

Declaration by the Candidate

Student number: [REDACTED]

I **Justice Mokgwati Kgaphola** hereby declare that this mini dissertation titled "**A Legal Analysis of the Feasibility of a Basic Income Grant in South Africa**" is my own work. I further declare that this mini dissertation has not been submitted by me or any person to this or any other institution. All the sources used have been acknowledged by means of references.



JM Kgaphola

May 2022

Declaration by the Supervisor

I hereby declare that I have supervised the student's mini-dissertation and in my opinion, this mini-dissertation is suitable in terms of scope and quality for examination.

A handwritten signature in black ink, appearing to read 'CI Tshoose', with a slight shadow effect underneath.

Prof CI Tshoose

May 2022

Abstract

Ravaged by the socio-economic ills of poverty, income inequality and unemployment, South Africa entrenched the constitutional right to access social assistance for everyone unable to support themselves and their dependents under section 27(1)(c). The state is obliged to create a comprehensive social security system, to ensure that all who need social assistance access it. But not all poor and deserving people access social assistance. The study found that underlying the obligation to improve the quality of life for all is the fundamental normative commitment to access social assistance. In 2002, the Taylor Committee recommended, *inter alia*, that the state implements a Basic Income Grant (hereafter the 'BIG') as part of its comprehensive social security project.

The study thus examines the legal feasibility of the BIG to provide social income support to eliminate widespread socio-economic ills, for all in South Africa. The study makes use of a desktop qualitative methodology garnered four-folded objectives. The relevant revelations were as follows: First, the study found that international and regional frameworks do not directly guarantee poor able-bodied working-age adults any social income support. Second, the study found that little jurisprudence interprets the right to social assistance, let alone a BIG. But a general body of socio-economic judgments developed over the years can aid in developing the right. Third, the study found that Covid-19 resurrected the over two-decade laments for a BIG, given the R350 Covid-19 SRD grants that were since provided. It was further found that there is reasonably sufficient capacity to roll out the BIG. Finally, the study included a comparative perspective and identified the Republic of Namibia, as the right comparator. The study found that South Africa can learn from the tremendous improvements in the quality of the lives of the people of Otjivero since the Namibian BIG Pilot Project. Also, the study found that there are numerous financing avenues for the BIG. Ultimately, the study recommended the gradual implementation of a BIG, starting with those aged 18 to 59 years.

Keywords: Poverty, Inequality, Unemployment, Basic Income Grant, Social Assistance, Covid-19 SRD, Working-age adults

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Ke leboga thekgo, tshepho le tlhohleletso!

List of abbreviations

BIG	Basic Income Grant
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
NDP	National Development Plan
SASSA	South African Social Security Agency
UBIG	Universal Basic Income Grant
UDHR	Universal Declaration of Human Rights

TABLE OF CONTENTS

Dedication	i
Declaration by the Candidate	ii
Declaration by the Supervisor	iii
Abstract	iv
Acknowledgements	v
List of abbreviations	vi
CHAPTER 1	1
INTRODUCTION AND BACKGROUND OF THE STUDY	1
1.1 Introduction	2
1.2 Problem statement	7
1.3 Research questions.....	7
1.4 Aims and objectives of the study	8
1.5 Scope and limitation of the study.....	8
1.6 Literature review	9
1.7 Definitions of key concepts.....	12
1.7.1 Basic Income Grant	12
1.7.2 Poverty.....	12
1.7.3 Social assistance	13
1.7.4 Unemployment security	14
1.7.5 Comprehensive social protection	14
1.7.6 Covid-19 Social Relief of Distress Grant	14
1.8 Methodology	15
1.9 Organisation of the study	15

1.10 Summary.....	16
Chapter 2	18
PRE AND POST-CONSTITUTIONAL SOCIAL ASSISTANCE IN SOUTH AFRICA	18
2.1 Introduction	19
2.2 Pre-constitutionalism: an overview.....	21
2.2.1 The pre-colonial era	21
2.2.2 Colonial social welfare	23
2.2.3 Social assistance and apartheid South Africa	27
2.3 Social assistance post constitutionalism.....	29
2.3.1 The constitutional right to social assistance.....	32
2.3.2 Legislative framework.....	38
2.4 Summary	41
Chapter 3	44
3.1 Introduction	45
3.2 The international level	45
3.2.1 International Labour Organisation (ILO)	49
3.2.2 Universal Declaration of Human Rights, 1948 (UDHR)	52
3.2.3 International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)	53
3.3 The regional level	57
3.3.1 African Charter on Human and Peoples' Rights.....	57
3.3.2 Southern African Development Community (SADC)	61
3.4 Summary	62
CHAPTER 4.....	63

COMPARATIVE SOCIAL ASSISTANCE LAW- THE 'BIG'	
DISCOURSE.....	63
4.1 Introduction	64
4.2 Basic Income Grant in South Africa- twenty years on	66
4.3 The Namibian Basic Income Grant in context.....	71
4.3.1 The Namibian BIG pilot project	72
4.4 COVID-19 Social Relief of Distress Grant in South Africa: <i>It is about time</i>	76
4.5 Summary	77
CHAPTER 5.....	79
CONCLUSION AND RECOMMENDATIONS	79
5.1 Introduction	80
5.2 Conclusion.....	80
5.3 Recommendations	88
5.3.1 Financing and sustainability of the BIG	89
5.3.2 Impact of the BIG on poverty reduction.....	90
5.3.3 Impact of a BIG on economic transformation	91
BIBLIOGRAPHY.....	92

CHAPTER 1
INTRODUCTION AND BACKGROUND OF THE STUDY

Contents

1.1 Introduction	2
1.2 Problem statement	8
1.3 Research question	8
1.4 Aims and objectives of the study	8
1.5 Scope and limitation of the study.....	9
1.6 Literature review	9
1.7 Definitions of key concepts.....	12
1.7.1 Basic Income Grant.....	12
1.7.2 Poverty.....	13
1.7.3 Social assistance	13
1.7.4 Unemployment security	14
1.7.5 Comprehensive social protection	14
1.7.6 Covid-19 Social Relief of Distress Grant.....	15
1.8 Methodology	15
1.9 Organisation of the study	15
1.10 Summary.....	17

1.1 Introduction

South Africa is a nation plagued by poverty, income inequality, and one of the highest unemployment rates in the world.¹ Approximately half of the people in South Africa are poverty-stricken.² Amidst all these, the government has been trying to bridge the gap, through various social security measures, in particular through social assistance.

Constitutionally guaranteed right to social assistance and its system of social grants is one indispensable course in mitigating overall income poverty and inequality.³ Kaseke notes that social assistance provisioning in South Africa is unique in that it primarily emanates from the Constitution of the Republic of South Africa, 1996 (hereafter the 'Constitution').⁴ The general scheme of the Constitution commits itself to redress these socio-economic phenomena, by establishing a 'society based on democratic values, social justice, and fundamental human rights; in view of improving the quality of life of every citizen and freeing their potential'.⁵ The Constitution seeks to archive these commitments through numerous provisions, in particular section 27.⁶

Section 27(1)(c) provides everyone with the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.⁷ This provision thus necessarily

¹ Avinash Govindjee and Ockert Dupper, "Constitutional Perspectives on Unemployment Security and a Right to Work in South Africa" in Sandra Liebenberg and Geo Quinot (eds), *Law and Poverty: Perspectives from South Africa and Beyond* (Juta & Co 2012) 333; Edwell Kaseke, 'The Role of Social Security in South Africa' (2010) 53 *International Social Work* 162. As at the first quarter of 2021, the unemployment rate in South Africa stood at 32.6 %, it then rose to a staggering 35.3% in the fourth quarter, Department of Statistics South Africa 2021 <www.statssa.gov.za/publications/P02111stQuarter2021> accessed 03 February 2022. See also the National Development Plan 2030 <www.gov.za/documents/national-development-plan-2030-our-future-make-it-work> accessed on 16 March 2021 356.

² Sandra Liebenberg, 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) *SAJHR* 234. See also BIG Finance Reference Group, *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* (2004) 8.

³ Govindjee and Dupper (n 1) 338.

⁴ Kaseke (n 1) 160.

⁵ Preamble to the Constitution.

⁶ S 27 of the constitution provides for, the [right] to health care, food, water and *social security, including, social assistance*' (own emphasis).

⁷ S 27(1)(c) of the Constitution declares that; 'Everyone has the right of access to - social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.'

acknowledges the perilous situation of the majority of South Africans and identifies social assistance as a measure to alleviate destitution.⁸

Typical for most socio-economic rights guaranteed by the Constitution, social assistance is also qualified. First, section 27(1) provides for the 'right of access' to social assistance. Second, section 27(2) orders the state to take reasonable legislative and other measures 'within available resources', in achieving the 'progressive realisation' of the right to social assistance.⁹ This constitutional provision, *albeit* qualified, unequivocally calls on the government to move towards eliminating the demise of the poor and unemployed. This study suggests that the use of the word 'must' in section 27(2), ought to be construed to have a strong obligatory character. The state is therefore inclined, through clear legislative, policy, programmes, and any other social welfare undertakings to improve the lives of the marginalised.¹⁰ As retired, Justice Nugent eloquently captured:

To be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation, it reduces a human in his or her dignity. The inevitable result of being unlawfully deprived of a grant that is required for daily sustenance is the unnecessary further endurance of that condition for so long as the unlawfulness continues.¹¹

Briefly, *Kate* notes some considerable matters; first, poverty has the potential to deprive those who fall within its wrath, of human dignity which is also a constitutional guarantee.¹² Second, the unjustified and perpetual denial, by the government, of social welfare grants to those in need to sustain their livelihoods, is a disheartening perpetuation of their indigence. It is thus argued in light of this backdrop that, the government's continuing disregard for the implementation of a Basic Income Grant (hereafter the 'BIG') violates the poor and unemployed people's right to social security and human dignity.

⁸ Sandra Liebenberg, "The Judicial Enforcement of Social Security Rights in South Africa" in Eibe Reidel (ed), *Social Security as a Human Right* (Springer 2007) 75.

⁹ S 27(2) of the Constitution 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'.

¹⁰ Mia Swart, "Social Security" in Stuart Woolman and Michael Bishop (eds), *Constitutional Law of South Africa (CLOSA)* (2nd edn RS 4 Vol 4, Juta & Co Ltd 2012) 56-1.

¹¹ *Mec, Department of Welfare v Kate* 2006 (4) SA 478 (SCA) (hereafter '*Kate*') at para 33.

¹² S 10 of the Constitution provides that, 'Everyone has inherent dignity and the right to have their dignity respected and protected'.

The provisioning of social security, including social assistance, is determined in terms of whether any selected group is confronted with exigencies of income poverty, unemployment, ill health, and disability.¹³ Tshoose,¹⁴ rightly asserts that these extremities hinder free participation in society. Commendably, social grants have a positive impact on the lives and livelihoods of the majority of the population they reach.¹⁵ The social assistance system in place generally covers, the old (persons 60 years and above), the disabled, and children (persons 18 years and younger), among others. There however remains a group of people the government has far too long overlooked; those that are neither old, young nor disabled, but nonetheless suffer the incremental consequences of income poverty and unemployment.¹⁶ As Kaseke,¹⁷ puts it, “those that are currently slipping through the net”.

In an endeavour to recognise, protect and support these marginalised, unemployed people of South Africa, The Committee of Inquiry into a Comprehensive Social Security System (hereafter the ‘Taylor Committee’), chaired by Professor Vivienne Taylor was instituted.¹⁸ The Committee was tasked, among others, to examine the feasibility of a BIG in South Africa. The work of the Taylor Committee culminated in the recommendation to implement a BIG.¹⁹ The Taylor Committee proposed at least a R100 monthly grant per person for all South African citizens, irrespective of age and income level. This recommendation *prima facie* eliminates the “means-tested” approach as far as social assistance is concerned.

Acknowledging that safeguarding social security rights demands both national and international consensus,²⁰ this study examines, international norms, principles, and standards regarding the right of access to social assistance. The constitutional recognition of the role of international law, in

¹³ Leila Patel *Social Welfare and Social Development* (2nd edn, OUP 2015) 164.

¹⁴ Clarence Tshoose, ‘Social Assistance: Legal Reform to Improve Coverage and Quality of Life for the Poor People in South Africa’ (LLD thesis, University of South Africa 2016) 7.

¹⁵ *Ibid* 4.

¹⁶ Govindjee and Dupper (n 1) 334- 340.

¹⁷ Kaseke (n 1) 166.

¹⁸ Patel (n 13) 163.

¹⁹ Chapter 3 of the Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa 2002 (hereafter, the ‘Taylor Committee Report’).

²⁰ Tshoose (n 14) 215; Isabel Ortiz *et al*, ‘Universal Basic Income Proposals in Light of ILO Standards’ (2018) Extension of Social Security Working Paper 62/2018, ix <www.ilo.org/secsoc/information-resources/publications-and-tools/Workingpapers/WCMS_648602/lang--en/index.htm> accessed 19 March 2021.

advancing our South African legal system signifies a commitment to abide by internationally acclaimed rules.²¹ Empowered too by section 39 of the Constitution,²² this study examines international documents instrumental to the protection of the right to social assistance in South Africa.

Internationally, the United Nations Universal Declaration of Human Rights (1948) ('UDHR'²³), the International Labour Organisation's Social Security Minimum Standards Convention (1952), and the International Covenant on Economic, Social and Cultural Rights (1966) ('ICESCR') are key.²⁴ Noteworthy, the International Labour Organisation ('ILO') comprehensively sets forth the underlying standards for the betterment of those suffering from the scourge of poverty and unemployment. In the modern-day globalised economy, in which South Africa is not except from, the standards of the ILO make up a particularly essential component of the BIG policy in South Africa. ILO guiding principles on the implementation of the Universal Basic Income Grant ('UBIG') are, therefore, especially instructive in this study.

Regionally, the African Charter on Human and People's Rights (1981) ('ACHPR') does not explicitly provide for the rights to social security, including social assistance.²⁵ Notwithstanding, the ACHPR has engaged in generous interpretation to ensure that these unwritten socio-economic rights are protected through the means of other socio-economic rights that

²¹ Michele Olivier, 'Interpretation of the Constitutional Provisions Relating to International Law' (2003) 6 *PER* 26.

²² S 39 provides for the interpretation of the Bill of Rights. It states that:

(1) when interpreting the Bill of Rights, a court tribunal or forum –

- (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) Must consider international law; and
- (c) May consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights...

²³ The UDHR was adopted by the United Nations (UN) General Assembly on 10 December 1948.

²⁴ The ICESCR was adopted by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966.

²⁵ Manisuli Ssenyonjo, 'Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years Since the Adoption of the African Charter' (2011) 29 *Netherlands Quarterly of Human Rights* 359.

are codified in the Charter.²⁶ This study, therefore, contends that, common to all these rights is the recognition of the notion of fundamental human survival and living a life of dignity, which if construed correctly advances the social welfare of poor Africans.²⁷

Worryingly, the African Commission on Human and Peoples' Rights (hereafter the 'African Commission'), has limited jurisprudence on social and economic rights generally and social welfare in particular. Ssenyonjo, justly argues that this extremely limited attention of the African Commission on socio-economic rights, "leads to widespread denials and violations" of social welfare rights for the extremely poor [emphasis added].²⁸

Interestingly, spearheading the call for a Basic Income Grant is Namibia. Namibia launched the first ever-Basic Income Grant pilot project in 2008.²⁹ Common to both South Africa and Namibia is income inequalities, unemployment, and fragmented social security regimes, among others.³⁰ There also exist geopolitical, cultural, social, economic, and legal parallels. Considering this backdrop, this study pinpoints Namibia as a suitable comparative jurisdiction from which South Africa can draw lessons, in the implementation of a BIG.

South Africa witnessed a large-scale rollout of the Social Relief of Distress Grant (hereafter 'SRD Grant'), at the breakout of the Coronavirus pandemic (hereafter 'Covid-19'). It is during this period that a vast majority of impoverished South Africans were catered for through this governmental

²⁶ Max Du Plessis and Tiyanjana Maluwa, "The African Union" in John Dugard *et al* (eds), *Dugard's International Law: A South African Perspective* (5th edn, Juta & Co Ltd 2018) 820. On this generous interpretation, see also, the African Commission's decision in *Communications 54/91, 61/91, 98/93, 164/97*; that starvation of prisoners violated art 16 guaranteeing the right to enjoy the best attainable state of physical and mental health; and also in *Communications 210/98 against Mauritania*, that the forcible eviction of persons amounted to a violation of the right to property in terms of art 14.

²⁷ Art 14 enshrines the right to property; Art 15, the right to work under equitable and satisfactory conditions; Art 16, the right to enjoy the best attainable state of physical and mental health; Art 17(1), the right to education as well as the right to the protection of the family and culture guaranteed by Arts 17(2) and (3), 18(1) and (2) and 16 of the ACHPR.

²⁸ Ssenyonjo (n 25) 360.

²⁹ Claudia Haarmann and Dirk Haarmann, 'Namibia: Seeing the Sun Rise- The Realities and Hopes of a Basic Income Grant Pilot Project' in Matthew Murray and Carole Pateman (eds), *Basic Income Worldwide: Horizons of Reform* (Palgrave Macmillan 2012) 33.

³⁰ Tshoose (n 14) 341.

social welfare grant. The Covid-19 Social Relief of Distress Grant (hereafter 'Covid-19 SRD Grant'), has been having a tremendous impact on the lives of the unemployed and destitute people of South Africa. It is, however, disappointing to note that, an indiscriminate catastrophe, Covid-19, prompted the state to adopt a measure, which is akin to the much needed, yet dormant BIG. This study thus adopts the Covid-19 SRD Grant as a quasi-BIG and seeks to show the urgent need for the implementation of a BIG.³¹ As this study shows, a BIG is viable in South Africa, but what is lacking is sheer political will.

1.2 Problem statement

The South African social assistance system, makes available social grants to only select groups of persons in need.³² Yet, there exists a group of persons who suffer the realities of perpetual unemployment, poverty, and inequality, thus also in need of social assistance. These persons being neither young, old, disabled nor war veterans, endure the great violation of their constitutionally sanctioned right to social assistance. These are the poor and unemployed people of South Africa, aged between 19 and 59 years. The Taylor Committee, almost two decades ago, acknowledged the particular demise of these persons and recommended the implementation of a BIG. Notwithstanding, the state has not implemented this imperative poverty eradication policy. To comprehensively address widespread poverty, unemployment, and inequality in South Africa, it is submitted that a BIG is an avenue for the state to robustly engage in and implement. In essence, coupling growth and pro-poor distributional change is imperative for poverty reduction. It is within this context that this study analyses the feasibility of the BIG income support for adults, overlooked by the existing income support system.

1.3 Research questions

Does the current South African social assistance system provide sufficient protection to the vulnerable and unemployed? By necessary extension,

³¹ The department of Social Development highlighted that the introduction of the covid-19 SRD revived the discourse on the feasibility of a BIG, <https://www.dsd.gov.za/index.php/latest-news/21-latest-news>.

³² These persons include; the elderly, children under the age of 18, fostered children, the disabled (including, care dependent children, and grants-in-aid), and war veterans and in exceptional circumstances social relief of distress grant.

therefore, is the implementation of a basic income grant in South Africa legally feasible?

1.4 Aims and objectives of the study

This study aims to examine the legal feasibility of the implementation of a BIG in South Africa.

The objectives that are distilled are:

1. To compare and contrast the international and regional standards of social assistance and whether they afford enough protection to the poor and unemployed.
2. Assessing constitutional jurisprudence on social welfare and whether it gives substance to the right of access to social assistance enshrined in the Constitution.
3. To identify the challenges in the implementation of a BIG in South Africa, in light of the Covid-19 SRD Grant.
4. To determine lessons that can be drawn about the policy and political effects of introducing a BIG in South Africa, in light of the Namibian BIG pilot project.

1.5 Scope and limitation of the study

The study discusses the concept of a BIG from the understanding that it applies only to unemployed South Africans aged 19 to 59 years old.

The study engages limited case law on the approach of the judiciary towards a BIG. This study thus assesses pertinent case law on the general body of socio-economic rights jurisprudence having a bearing on the right to social assistance.

1.6 Literature review

Marais points out that, a BIG (or UBIG as is referred to elsewhere) is not a novel one.³³ Notwithstanding, considerable literature points to its remaining largely, unimplemented.³⁴ This is a distressing trend.

The concepts 'basic income grant' and 'universal basic income grant' are not however intended to be construed as synonyms. Marais,³⁵ further highlights on the one hand that, the term 'universal income' entails a system that replaces other forms of social welfare. On the other, he construes the term 'basic income' as a complementary, not an all-encompassing system that exists alongside other forms of institutional social protection. This study adopts the latter construction for South Africa, given the progressive nature with which the Taylor Committee recommended the BIG be approached.³⁶ The concept 'BIG', became most prominent in South Africa in 2002 upon the Taylor Report recommending that it be "faced-in, on a universal, non-means-tested basis".³⁷

Liebenberg,³⁸ acknowledges that by supplementing income with BIG, household resources will increase substantially, as opposed to only providing social grants, according to the current social assistance system, which overlooks the fact that the entire household consumes whatever grants are received. Nyenti and Mpedi,³⁹ likewise assert that the concept of a BIG consists of social security entitlements that are provided in addition to social insurance schemes. These assertions, keep up with the auxiliary approach perceived by this study, for a truly effective social security system.

³³ Hein Marais, 'The Employment Crisis, Just Transition and the Universal Basic Income' in Vishwas Satgar (ed), *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives* (WITS University Press 2018) 81. Noteworthy, the idea of a basic income dates back to the mid-nineteenth century.

³⁴ On a relatively smaller pilot scale, a basic income grant was introduced in the Namibian town of Otjivero-Omitara in 2008. Substantial social benefits can be delineated from this pilot project, including reduced poverty, increased school attendance, increased economic activity and the decrease in crime among other benefits.

³⁵ Marais (n 33) 80.

³⁶ Chapter 3 of the Taylor Committee Report.

³⁷ Ibid.

³⁸ Sandra Liebenberg, 'Universal Access to Social Security Rights: Can a Basic Income Grant Meet the Challenge? Legislation and Policy' (2002) 6 *ESR Review* 10.

³⁹ Mathias Nyenti and Letlhlokwa Mpedi, 'The Impact of SADC Social Protection Instruments On the Setting up of a Minimum Social Protection Floor in Southern African Countries' (2012) 15 *PER* 244-281.

This efficacy will see ample reduction in poverty, joblessness, and income inequality.

Scholars, including, Van der Berg, Burger, Berger, Louw, and Yu,⁴⁰ however, warn that the social grant system as a poverty-reduction strategy is nearing the boundaries of its effective use, because of fiscal constraints.

There is a likely increase in the scope and intensity of the crisis of waged work in South Africa. This is attributed to the wide introduction of digitalisation and other technologies. As such, a universal basic income grant holds great appeal, contends Marais.⁴¹ This potential is also true of South Africa's BIG. Astonishingly as Tshoose,⁴² Govindjee and Dupper,⁴³ aver, the Taylor Committee's support for the implementation of BIG made minimal inroads in governmental policy debates.

Despite the concerns that social assistance provisions for the unemployed, weaken work motivation and creates a dependency culture maintained by Jensen,⁴⁴ Bertrand *et al*,⁴⁵ and Ranchod;⁴⁶ Currie and De Waal, aver that the right to social assistance may not be infringed by retrogressive measures.⁴⁷

Everyone is constitutionally guaranteed the right to social assistance. Section 38 of the Constitution further provides 'everyone' the right of recourse where this right is alleged to be violated.⁴⁸ The courts are therefore

⁴⁰ Servaas Van der Berg, Ronelle Burger, Ruolf Berger, Megan Louw and Derek Yu, 'Trends in Poverty and Inequality Since the Political Transition' (2006) *Development Policy and Research Unit Working papers* 06/104, 28 < <https://ideas.repec.org/p/ctw/wpaper/06104.html>> accessed 30 April 2021.

⁴¹ Marais (n 33) 70.

⁴² Tshoose (n 14) 88.

⁴³ Govindjee and Dupper (n 1) 339. The *Creating Our Future* government discussion paper launched by the Department of Social Development highlights the gaps in the social assistance system framework in South Africa pertaining to the unemployed youth and adults.

⁴⁴ Robert Jensen, 'Do Private Transfers "Displace" the Benefits of the Public Transfers? Evidence from South Africa' (2003) 88 *Journal of Public Economics* 89.

⁴⁵ Marianne Bertrand, Sendhil Mullainathan and Douglas Miller, 'Public Policy and Extended Families: Evidence from Pensions in South Africa' (2003) 17 *The World Bank Economic Review* 28-30.

⁴⁶ Vimal Ranchod, 'The Effect of the South African Old Age Pension on Labour Supply of the Elderly' (2006) 74 *South African Journal of Economics* 730.

⁴⁷ Ian Currie and Johan De Waal, *The Bill of Rights Handbook* 591.

⁴⁸ S 38 entitled 'enforcement of rights' states that,

important institutions that give substance and effect to the right to social assistance. This view of the importance of judicial intervention holds true for the implementation of social assistance programmes,⁴⁹ including the BIG. Liebenberg thus maintains the necessity to give effect to the right to social assistance, by effective implementation of social assistance programmes combined with profound measures to improve access to social assistance and values underpinning this right.⁵⁰

Govindjee and Dupper aver the need for income support through social welfare programmes, as follows:

While the absorption of more people into the labour market is at the centre of South Africa's poverty reduction strategy, there remains a need for programmes that provide income support to the unemployed and people that are unable to work.⁵¹

This assertion is similarly truthful for a BIG programme, which is capable to provide widespread income support. In addition, a BIG is an amicable aid, in mitigating the inevitable impacts of the digital age, on the labour market.

As alluded to in the introduction to this literature review, there is a widespread scholarly consensus on the need to implement a BIG in South Africa. In addition, the current social welfare coverage has brought considerable socio-economic changes. However, this system can do only so much, and thereby neglects a significant group; those that are poor, unemployed, and 'ineligible'. It is submitted that the incessant 'snail pace' of implementing the BIG by the government raises many questions about its constitutional obligation toward poor households. Furthermore, the BIG has been shelved by the government for way too long, to the peril of the majority of persons in South Africa.

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...

⁴⁹ Liebenberg, 'The Right to Social Assistance' (n 2) 232.

⁵⁰ Ibid.

⁵¹ Govindjee and Dupper (n 1) 338.

1.7 Definitions of key concepts

Prozesky-Kuschke,⁵² asserts that it is important to understand the proper use of concepts, as confusion frequently reigns where incorrect concepts are used. This study thus adopts the following crucial concepts.

1.7.1 Basic Income Grant

The concept of a BIG is central to this study, and as such a definition, conceptualised by the Taylor Committee is vital.

The Taylor Committee defines the BIG as a non-contributory, universal, non-means-tested basic grant. This concept recognises that social security programmes in place, predominantly focus on waged work, thus excluding a considerable number of long-term unemployed persons, and informal and temporary workers.⁵³ This is a comprehensive social welfare measure that seeks to provide income support to these marginalised persons, through the progressive provision of a basic grant.⁵⁴

1.7.2 Poverty

The concept of 'poverty' does not bear a rigid definition.⁵⁵ Countries' social and economic contexts and individual circumstances, construct poverty differently. Generally, people are considered poor when they lack sufficient purchasing power.⁵⁶ Economic well-being relates to the ability of individuals to acquire a basic level of consumption or human welfare.⁵⁷

⁵² Birgit Prozesky-Kuschke, "Construction, Engineering and Services Contracts" in Chris Nagel *et al* (eds), *Commercial law* (5th edn, LexisNexis 2015) 702.

⁵³ Franco Barchiesi, 'South African Debates on the Basic Income Grant: Wage Labour and the Post-Apartheid Social Policy' (2007) 33 *Journal of Southern African Studies* 573.

⁵⁴ Taylor Committee Report, 35.

⁵⁵ Johanna Kehler, 'Women and Poverty: The South African Experience' (2001) 3 *Journal of International Women's Studies* 41-42.

⁵⁶ Rufus Akindola, 'Towards a Definition of Poverty: Poor People's Perspectives and Implications for Poverty Reduction' (2010) 25 *Journal of Developing Societies* 122-123.

⁵⁷ OECD, 'Framework for statistics on the distribution of household income, consumption and wealth' [2018] at <www.oecd-ilibrary.org/docserver/9789264194830-5-en.pdf?expires=1624874981&id=id&accname=guest&checksum=21A919C2E242EEC2B6FE81F2BF6C399C> accessed 20 June 2021.

Broadly construed, poverty denotes an inability to attain a minimum standard of living, measured in terms of basic consumption needs and income required to satisfy those needs.⁵⁸ Narrowly construed, poverty is the inability of individuals, households, or entire communities to command sufficient resources to satisfy a socially acceptable minimum standard of living.

1.7.3 Social assistance

Social assistance can be defined as, tax-based benefit payments on a universal or targeted basis, aimed at minimum income support. Social assistance is the primary way in which the government attempts to eliminate income poverty in low-income households. Social assistance is made up of means-tested,⁵⁹ payments in cash or kind to people who are not able to support themselves and their dependents.

The Social Assistance Act 9 of 2004, provides various types of social grants in South Africa for those in need. These include three broad categories namely; those for children, the elderly, and the disabled. First, children's grants consist of, Child Support Grant, Care Dependency Grant, and Foster Grant. Secondly, grants for the elderly include Old Age Grant, War Veterans Grant, and Grant-in-Aid. Finally, grants for persons living with disabilities, compose of the Disability grant. Noteworthy, there may be overlaps among these grants, in which case, only one type of grant may be applied for and approved.

Alongside these three broad categories, there is the uncommon Social Relief of Distress Grant. This is a temporary grant directed at persons in dire need, in that they are not able to provide themselves or their families with the most basic needs.

Social assistance is the primary source of survival for the poorest of the poor in South Africa.⁶⁰

⁵⁸ World Bank, *World Development Report 2000/2001: Attacking Poverty* (2000 New York OUP).

⁵⁹ A means test entails that the income and assets of an applicant for social assistance are evaluated in order to ascertain whether the applicant's means are below a stipulated threshold. This means test varies from one type of grant to another.

⁶⁰ Tshoose (n 14) 24.

1.7.4 Unemployment security

Unemployment protection-specific aspects of social protection, including social security strategies focusing on the problem of unemployment as well as prevention and integration strategies directed at minimising unemployment.⁶¹

This is an uncommon concept in literature. Be that as it may, it forms a crucial part of this study as it acknowledges the need for the state to prioritise issues relating to unemployment, within the more familiar area of social security. In this regard, this term incorporates both unemployment insurance and unemployment assistance.⁶²

1.7.5 Comprehensive social protection

The concept of comprehensive social protection is the mainstay of the Taylor Report. This concept is defined by the Taylor Committee as:

The basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. Comprehensive social protection is broader than the traditional concept of social security and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens.⁶³

As a result of comprehensive social protection, all South Africans can have access to a national integrated and sustainable social security system, with the ultimate aim of ensuring that they should not be allowed to live below acceptable standards and have a minimum income.⁶⁴

1.7.6 Covid-19 Social Relief of Distress Grant

This is the special Covid-19 pandemic-induced social relief of distress grant, targeted at unemployed individuals, aged between 19 and 59 years old. These individuals must neither receive any income nor any other social grant nor support from the Unemployment Insurance Fund.⁶⁵

⁶¹ Govindjee and Dupper (n 1) 334-335.

⁶² Ibid 335.

⁶³ Taylor Committee Report, 41.

⁶⁴ Tshoose (n 14) 27.

⁶⁵ Tim Köhler and Haroon Borat, 'Covid-19, social protection, and the labour market in South Africa: Are social grants being targeted at the most vulnerable?' (2020) *Development Policy Research Unit Working Paper 202008*, 5.

1.8 Methodology

This mini-dissertation adopts a desktop-based literature study. It thus engages legislation, journal articles, books, reports, discussion documents, and online sources.

It also incorporates a comparative component by assessing the Namibian BIG pilot project. This jurisdiction is selected due to its stride in the implementation of a BIG. In addition, socio-economic, political, and legal ties between Namibia and South Africa informs this comparative choice. Furthermore, the fact that Namibia is the first-ever country in the world, from Africa, to move towards implementing a BIG is noteworthy. Therefore, this study suggests that important lessons can be learned from Namibia, in the implementation of a BIG in South Africa.

1.9 Organisation of the study

Chapter 1

Introduces this study and provides a roadmap for this mini dissertation. It contextualises the problem and highlights the socio-economic issues necessitating the need to implement a BIG. It further outlines pertinent arguments on a BIG in South Africa. It pinpoints a comparative element, drawing from Namibia. Ultimately, it furnishes a guide to the methodology, limitations, aims, and objectives adopted by this study.

Chapter 2

This chapter provides the historical perspective of the South African social assistance regime. In particular, it discusses poverty, unemployment, and income inequality and how these exigencies prompted the need for the provision of social grants. It looks specifically at the governmental approach to social welfare for the unemployed pre-constitutionalism on the one hand, and post-constitutionalism on the other. In the latter instance, the chapter looks at constitutional standards of the right to social assistance and how this right respond to 'the three grant challenges'. It further looks at this right through its enabling legislation. It finally, highlights the fact that the poor and unemployed, especially able-bodied individuals aged 18 to 59 years old, have not been catered for, despite their dire indigence.

Chapter 3

Chapter 3 deliberates on the various international regulatory instruments in South Africa pertaining to social welfare for the impoverished and unemployed. Examination of the regional and international principles on the right to social assistance and their bearing on a BIG in South Africa is undertaken. Primarily, the chapter concludes that a BIG is not sufficiently provided in international law. Notwithstanding, the segmented social assistance framework give grounding to the right, through a generous interpretation of their socio-economic rights.

Chapter 4

This chapter gives a comparative overview of the Namibian social welfare responses to endemic unemployment, income inequality, and poverty. The BIG pilot project launched in 2007 in this country is examined. Furthermore, it explores policy documents and the basic components of a BIG. The chapter then explores the Covid-19 SRD Grant and adopts it as a quasi-Basic Income Grant to reiterate the urgent need for implementing a BIG. The chapter thus draws some lessons that South Africa may use from this state in consideration of gradually implementing a BIG.

Chapter 5

This chapter provides final conclusions about the viability and potential efficacy of a BIG in South Africa for the poor and unemployed and offers recommendations for the way forward.

1.10 Summary

South Africa has a lengthy battle with the challenges of poverty, inequality, and joblessness. Social security measures have been put in place over the years to address these major issues. Measures include constitutionally enshrined right of access to social security, including, appropriate social assistance. Strictly construed there is a stark difference between social security and social assistance.⁶⁶ The social security system is relatively broad and encompasses, on the one hand, a contributory element on the part of beneficiaries. On the other hand, it includes the non-contributory, wholly state-funded (social assistance) system that covers a relatively major segment of South Africans.

⁶⁶ Currie and de Waal (n 47) 592.

Social assistance, being the main concern of this study, is more pronounced, given the rise in unemployment, among other extremities.⁶⁷ Social assistance, through its social grant programmes, is chiefly regulated by the SAA. The SAA provides for various social grants along with their corresponding eligibility criteria. It essentially provides for social assistance based on, on the one hand, financial need and on the other, that these persons must also be aged over 60 years, disabled or younger than 18 years. Importantly, the SAA does not provide any social assistance to able-bodied persons aged between 18 and 59. Accordingly, the present social assistance system overlooks this milieu. Imperatively, social assistance is a constitutionally guaranteed right, to which everyone is deemed to be entitled. However, in fact, not 'everyone' enjoys this right.

A BIG was proposed in South Africa to comprehensively address the fragmented social welfare system in the country. Alarming, this important measure stands unimplemented and virtually dormant in governmental debates. It was in the face of the Covid-19 pandemic that the Covid-19 SRD Grant was provided which seemingly mimicked a BIG. This grant is targeted at persons between 18 and 59 years old and unemployed. This system also being means centred as it stands, is much celebrated and desired in the long run by those in dire need in South Africa. This study emphatically contends that a BIG must be gradually implemented for 18- to 59-year-old individuals, to mitigate the exigencies they face.

⁶⁷ BusinessTech, 'How Many South Africans Now Rely on Social Grants: 1996 vs 2020' [2021] <www.businesstech.co.za/news/government/459186> accessed 11 July 2021.

Chapter 2
PRE AND POST-CONSTITUTIONAL SOCIAL ASSISTANCE IN
SOUTH AFRICA

Contents

2.1 Introduction	19
2.2 Pre-constitutionalism: an overview.....	21
2.2.1 The pre-colonial era	21
2.2.2 Colonial social welfare	23
2.2.3 Social assistance and apartheid South Africa.....	27
2.3 Social assistance post-constitutionalism.....	29
2.3.1 The constitutional right to social assistance in South Africa..	32
2.3.2 Legislative framework	38
2.4 Summary.....	41

2.1 Introduction

Historical conditions are often used as an inevitable context for current policy and an avenue to better understand the limits and merits of current reform agendas.⁶⁸ Tshoose,⁶⁹ quoting former Minister of Finance Pravin Gordon maintains that 'the legacy of our past is not only that of difficulty and despair, but we can also build on this past to get things done today'.⁷⁰ The constitutional right of access to social assistance must be interpreted contextually, like all other constitutional rights.⁷¹ Currie and de Waal,⁷² posit that this entails a historical understanding of the type of society that South Africa once was and against which the new Constitutional dispensation has set itself.⁷³

De Vos *et al*,⁷⁴ in their book, *South African Constitutional law in context*, highlight the significance of South Africa's historical context to contemporary constitutional law discourse. They assert that a discussion of the historical context from which the modern democratic state in South Africa emerged, insists on a deliberation of the pre-democratic dispensation. By the same token, the particular history of social welfare remains imperative in understanding the constitutional right of access to social

⁶⁸ Clarence Tshoose, 'Social Assistance: Legal Reform to Improve Coverage and Quality of Life for the Poor People in South Africa' (LLD thesis, University of South Africa 2016) 39-40. See also Larry Prochner and Margeret Kabiru, 'ECD in Africa: A Historical Perspective' in Marito Garcia, Alan Pence, and Judith Evans (eds), *Africa's Future, Africa's Challenge - Early Childhood Care and Development in Sub-Saharan Africa* (The World Bank 2008) 117.

⁶⁹ Tshoose (n 68) 39.

⁷⁰ See also the Speech by the Minister of Finance of the Republic of South Africa, Cape Town, 22 February 2012 <www.info.gov.za/speeches/2010/10021715051004.htm> accessed 03 October 2021.

⁷¹ Ian Currie and Johan de Waal, *The Bill of Rights Handbook* (6th edn updated by Thembeke Ngcukaitobi, Juta & Co Ltd 2013) 211.

⁷² Ibid.

⁷³ See also James Midgley and David Piachaud, 'Imperialism, Colonial and Social Welfare' in James Midgley and David Piachaud (eds), *Colonialism and Welfare: Social Policy and the British Imperial Legacy* (Edward Elgar 2011) where they asserted that 'social policy in the developing world cannot be understood without examining the way welfare policies and programmes introduced during the imperial era have continued to influence current policy-making'.

⁷⁴ Pierre De Vos and Warren Freedman, *South African Constitutional Law in Context* (OUP 2014) 5.

assistance. As Liebenberg⁷⁵ observed, the depth of poverty and inequality in South Africa is attributed to its history of colonialism and apartheid.

Kruger,⁷⁶ also points out that recent historical literature has greatly improved the understanding of the history of poverty in South Africa. Importantly it improved comprehension of how the poor escaped destitution. Most of these studies focus on select groups of social welfare beneficiaries mainly; the elderly, the disabled, and children. Worryingly, they do not specifically enough assess the provision of social welfare assistance to the unemployed working-age population⁷⁷. This chapter thus analyses, on the one hand, the emergence of social assistance and shows the historical marginalisation of the majority of people, including the working-age population in particular. On the other hand, the chapter discusses the constitutionally enshrined right to social assistance under the Constitution. This chapter thus shows that a comprehensive social grant system (Basic Income Grant in modern parlance) has long been the wildest dream of South African people.

Against this backdrop, this chapter not only presents a discussion of South African social welfare as it were, before the attainment of democracy but also that of social assistance post-constitutionalism. It considers the measures that enabled social welfare provisioning during the pre-colonial, colonial, and apartheid eras. Further, the chapter examines how social assistance is now understood under the constitution. The chapter then funnels and investigates whether, and how the unemployed working-age group was and is now catered for. In light of this trajectory, this chapter submits that the South African government has long been overlooking the precarious situation of the vast number of people, especially, the working-age population. Troublingly, many of them are neither employed nor have any means of sustaining a dignified living.

⁷⁵ Sandra Liebenberg, 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) *South African Journal of Human Rights* 236.

⁷⁶ Johannes Kruger, 'State Provision of Social Security: Some Theoretical, Comparative, and Historical Perspectives with Reference to South Africa' (Master of Commerce Thesis, University of Stellenbosch 1992)108.

⁷⁷ For this study, the 'working age group' is used to denote, the youth and adult persons between the ages of 18 and 59 years. This is the group that falls outside the reach of social grant assistance, due to the current means-tested eligibility requirements.

2.2 Pre-constitutionalism: an overview

Income poverty is a socio-economic contingency, which has from time immemorial been bothersome. From the pre-colonial to the colonial and apartheid eras poverty threatened the social welfare of South Africans. Pre-constitutional era governments are primarily characterised by their racially motivated approaches to most, if not all facets of human dignity. The right to appropriate social welfare assistance was not an expected aspect for 'black' South Africans, the working-age in particular. Social security programmes were directed at the exclusive benefit of the so-called poor 'whites'. Several of these social security initiatives were prevalent, *albeit* fragmented, and often outside of direct governmental involvement.⁷⁸ It was, however, the findings and recommendations of several commissions of inquiry that the then governments appointed, on 'white' poverty that prompted several coverage expansions. Arguably, this could be said to be the start of the direct involvement of the government in social welfare institutionalisation.⁷⁹

2.2.1 The pre-colonial era

The provision of pro-poor relief dates back to Victorian models of social welfare.⁸⁰ Social assistance (a subset of social security) is a relatively contemporary concept in South Africa.⁸¹ Social grants as a form of social assistance were gradually introduced before the advent of democracy. In South Africa, the activities of the Dutch Reformed Church in 1657 are acknowledged. In essence, social welfare has evolved from the pre-

⁷⁸ Gugulethu Nkosi, 'Traditional and Contemporary Social Assistance Measures in South Africa: A Historical Perspective' (2013) 28 *Southern African Public Law* 316. The Dutch Reformed Church (*Nederduitse Ggereformeerde Kerk*) was one such initiative by churches that actively provided the poor 'white' population with social welfare support.

⁷⁹ *Ibid* 317.

⁸⁰ Stephanie Brockerhoff, 'A Review of the Development of Social Security Policy in South Africa: Monitoring the Progressive Realisation of Socio Economic Rights Project' (2013) Studies in Poverty and Inequality Institute (SPII) Working Paper 6, 20 < <http://spii.org.za/wp-content/uploads/2018/02/2013-07-SPII-Working-Paper-6-Review-of-Social-Security-Policy.pdf>> accessed 15 August 2021. English welfare policy strongly influence the emerging social assistance laws.

⁸¹ Tshoose (n 68) 39.

colonial,⁸² colonial, and apartheid times, to today coming to be known as social assistance under the Constitution.

In his doctoral thesis, Tshoose,⁸³ compellingly maintains, finding his cue from Chaskalson, that what is today known as the Republic of South Africa was not undiscovered when the first European settlers cruised to the Cape in the mid-17th to early 18th century. South Africa, "was the home of various indigenous African tribes, each with their legal systems".⁸⁴ Indigenous people during the pre-colonial period operated a system of social assistance that was premised on informal arrangements and no formal social security existed.⁸⁵ As a result, the history of social assistance in South Africa could be traced even before the colonial administration.⁸⁶

Pre-colonial South Africa relied on women, mutual aid, kinship, lineal communalism, and community support systems to meet basic human needs.⁸⁷ Patel,⁸⁸ avers that male dominance marked patriarchal and patrilineal households and the well-being of children. In addition, this patriarchal inclination overlooked women and viewed them as occupying an inferior position in society, accompanied by a sex-based division of labour. These came before the colonial and apartheid welfare systems.⁸⁹

Kruger,⁹⁰ Nkosi,⁹¹ and Tshoose,⁹² among other scholars, point to the fact that indigenous societies had been established in South Africa before colonialism. This is a settled point of events. However, what is problematic is the lack of formal or state institutions before colonialism.⁹³ This

⁸² Nkosi (n 78) 310. Nkosi explains that the pre-colonial period, used broadly is understood to 'denote a time before the indigenous African culture came into contact with, and was influenced by, 'Western' cultures'.

⁸³ Tshoose (n 68) 42.

⁸⁴ Ibid.

⁸⁵ Megan Govender, 'Conditional Cash Transfer as a Means of Addressing Poverty in South Africa' (Doctor of Commerce thesis, University of South Africa 2011) 79-81.

⁸⁶ Tshoose (n 68) 42.

⁸⁷ Leila Patel, *Social Welfare and Social Development* (2nd edn, OUP 2015) 44.

⁸⁸ Ibid.

⁸⁹ For an extensive account of the pre-colonial social assistance, see Nkosi (n 78 above)

⁹⁰ Kruger (n 76) 108-109.

⁹¹ Nkosi (n 78) 310-314.

⁹² Tshoose (n 68) 42,46.

⁹³ See generally Kruger (n 76) 108. See also Christa Rautenbach, *Introduction to Legal Pluralism in South Africa* (5th edn, LexisNexis 2018) 9. Rautenbach asserts that the history of indigenous law is essentially unwritten history and the main source of information is oral tradition.

shortcoming makes it relatively uneasy to trace the development of social welfare before the introduction of colonial administration in South Africa.⁹⁴ As is shown below, the subsequent superimposition of Western law upon the indigenous people of South Africa, significantly disrupted and denigrated their indigenous social welfare systems.⁹⁵ Accordingly, the typical Eurocentric starting point in the discourse of South African legal and political history, with the 1652 settlement is taken on.⁹⁶

2.2.2 Colonial social welfare

South Africa was a European colony from the mid-17th century to the late 18th century, when the British acquired sovereignty over the Cape colony in 1814.⁹⁷ The colonial and, following it, the apartheid period was marked by racialised approaches to poverty issues, chiefly marginalising 'black' people. These segregationist approaches saw poverty as a social ill, different among the different race groups, as well as on gender grounds. The colonial time also ushered in the fallacious notion of the so-called 'poor white problem'.⁹⁸ The so-called 'white' poverty was viewed as a social-economic phenomenon that required 'special' redress. Accordingly, social welfare initiatives were directed only at poor white persons.

The Dutch on arrival in 1652 through the Dutch East Indian Company established a permanent European settlement in the then Cape Colony. A few years later in 1657 the Dutch East Indian Company and the Dutch Reformed Church founded social welfare systems, in response to 'white' poverty.⁹⁹ Initially, the needs of the poor were provided for by families and

⁹⁴ Kruger (n 76) 108. South Africa was a Dutch colony from the mid-17th century to the early 18th century, when the British acquired sovereignty over the Cape Colony in 1814.

⁹⁵ Nkosi (n 78) 313-314.

⁹⁶ The author acknowledges that an understanding of the indigenous African social welfare system is worthwhile. As Tshoose (n 68) 46 finds, '[T]he pre-colonial society (in particular Africans) in South Africa relied mainly on the kinship group, women, communism and mutual aid to meet human needs.'

⁹⁷ Tshoose (n 68) 47; Nkosi (n 78) 314. See also Beth Goldblatt, 'Social Security in South Africa: A Gender and Human Rights Perspective' (2014) 47 *Law and Politics in Africa, Asia and Latin America* 23.

⁹⁸ On the notion of 'white poverty' see generally Nkosi (n 78) 316. See also Robert Vosloo, 'The Dutch Reformed Church and the Poor White Problem in the Wake of the First Carnegie Report (1932): Some Church Historical Observations' (2011) 37 *Studia Historiae Ecclesiasticae* 67-85.

⁹⁹ Tshoose (n 68) 43-44.

communities at large. The church was thus at the centre of providing for the essential needs of the poor, and the state played a limited role.

The Dutch settlers were Calvinists and their belief in predestination and being the chosen people gave religious sanctions to their racial attitudes.¹⁰⁰ The exclusive group consciousness of the Dutch settlers manifested itself in the expression of racial and social superiority and viewed indigenous African people, their customs and usages as well as their rich tradition of social organisation to be inferior.

As Tshoose,¹⁰¹ eloquently observed, the beginning of discrimination on racial classification, the denigration of indigenous modes, social service paternalism, and the incomprehensive social welfare systems; giving preference to 'whites', emerged during colonialism.¹⁰² Noteworthy, the duty to provide social assistance was evident, though extremely limited and racially skewed. Colonialism imposed enormous social changes on indigenous communities, however, no responsibility was taken for the social costs of such large-scale social disruption.

In the 1860s, the discovery of mineral resources foreshadowed industrialisation in South Africa, changing the social and political systems in a relatively short space of time.¹⁰³ The country moved from a society characterised predominantly as agrarian to a largely developed, industrialised one. Patel,¹⁰⁴ asserts that "industrialisation impoverished blacks – and some whites – and laid the foundation of racial capitalism and racial differentiation". During this industrialisation, the responsibility of welfare distribution rested with churches and voluntary initiatives that led to the development of a national welfare plan.¹⁰⁵

As indicated above, industrial and urbanisation processes led to widespread poverty problems. The socio-economic needs of children, the disabled, and the poor obtained focused attention. These needs were often provided

¹⁰⁰ Patel (n 87) 45; Tshoose (n 68) 44.

¹⁰¹ Tshoose (n 68) 46.

¹⁰² See also Patel (n 87) 45.

¹⁰³ Jeremy Seekings, 'The Social Question in *Pre-Apartheid* South Africa: Race, Religion and the State' in Jeremy Seekings (ed), *One Hundred Years of Social Protection* (Palgrave Macmillan 2021) 193.

¹⁰⁴ Patel (n 87) 45.

¹⁰⁵ Tshoose (n 68) 44.

through institutional care by organisations such as the Dutch Reformed Church.

Early social security initiatives directed at curbing white poverty were further evident in the 1910s.¹⁰⁶ Seekings,¹⁰⁷ and Haarmann,¹⁰⁸ note that the first formal social security schemes were introduced in 1910. Notably, this period marked the formation of the Union of South Africa.¹⁰⁹ After this formation, the national welfare planning for the 'whites' became possible through coordinated efforts by the Church and voluntary welfare initiatives. Patel,¹¹⁰ captured this as having paved the way for the partnership between the state and the voluntary sector in social welfare provisioning.¹¹¹ Social assistance after the Union in 1910 is characterised as one of pervasive racial discrimination.¹¹²

Social assistance for the elderly, the disabled, and children financed by the state emerged at this time.¹¹³ These schemes implemented via the Workmen's Compensation Act of 1914 and the Children's Protection Act of 1913, provided benefits for workers and the maintenance of children, respectively.¹¹⁴ These legislative initiatives were directed at maintaining the "boundaries of whiteness".¹¹⁵ This white supremacist inclination required intensified segregation to limit associations between white and non-white people. As Seekings,¹¹⁶ cogently notes, resolving the poor white problem meant, "protecting unskilled white workers (and their dependents, in both rural and urban areas) who lacked the skills required for skilled employment and were unable to compete for unskilled work with cheaper African labour".

¹⁰⁶ Nkosi (n 78) 316. See also Seekings (n 103 above).

¹⁰⁷ Seekings (n 103) 197.

¹⁰⁸ Claudia Haarmann, 'Social assistance in South Africa: Its potential Impact on Poverty (PhD in Development Studies thesis, University of the Western Cape 2000) 12.

¹⁰⁹ The Union of South Africa was established in 1910 as the outcome of protracted negotiations following the British defeat of the independent Boer republics in the South African War.

¹¹⁰ Patel (n 87) 47.

¹¹¹ See also Seekings (n 103) 200.

¹¹² Liebenberg (n 75) 242.

¹¹³ Haarmann (n 108) 12.

¹¹⁴ Ibid. See also Kalie Pauw, 'Expanding the Social Security Net in South Africa: Opportunities, Challenges and Constraints' (2007) *Development Policy Research Unit Working Paper 07/127*, 12 < <https://open.uct.ac.za/handle/11427/7272>> accessed 21 August 2021.

¹¹⁵ Seekings (n 103) 200.

¹¹⁶ Ibid 198.

Growing state involvement in social welfare provisioning led to an array of investigations into economic hardships experienced by 'whites'.¹¹⁷ The government appointed the Economic and Wages Commission in 1925, tasked generally with the investigation into the issues of 'white' poverty. The Commission distinguished between urban and rural poverty and found that in the former instance, cheap labour provided by 'blacks' erupted competition against the 'whites', especially the unskilled.¹¹⁸ The Commission thus recommended the need for unemployment benefits to be put in place. As is apparent, this measure was anti-black and sought predominantly to obviate the so-called 'white poverty'.

Matters did not end there, further commissions were conducted. In 1926, the Pienaar Commission was appointed.¹¹⁹ As Seekings noted,¹²⁰ the Pienaar Commission was to investigate:

- i. The payment of pensions by the state to the necessitous aged and permanently incapacitated persons who were unable to maintain themselves and for whom no provision at that time existed.
- ii. A system of National Insurance as a means of making provision for risks of sickness, accident, premature death, invalidity, old age, unemployment, and maternity.

The Pienaar Commission, in its 1927 report among others recommended the introduction of means-tested old-age pensions. However African people were excluded, while coloureds received lower benefits than white pensioners. Consequently, the Old Age Pensions Act,¹²¹ was passed and in 1929 the first pensions were paid. The Old-age pensions formed another cornerstone of the segregationist policies, aimed at elevating white people to civilised standards of living, above and certainly not below or on par with Africans.¹²²

Furthermore, the government with the enduring influence of the Dutch Reformed Church steered in 1929, the Carnegie Commission of Enquiry to comprehensively investigate the 'white poverty'. The Carnegie Commission focused on five elements namely; sociological, educational, psychological, health, and economic.¹²³ The recommendations culminating from this

¹¹⁷ Nkosi (n 78) 317.

¹¹⁸ Ibid.

¹¹⁹ The Pact Government appointed the Pienaar Commission, chaired by PJ Pienaar.

¹²⁰ Seekings (n 103) 388.

¹²¹ Act 22 of 1928 (hereafter the 'OAPA').

¹²² Seekings (n 103) 199.

¹²³ Nkosi (n 78) 318.

investigation were thorough and looked also into the causes and effects of poverty among 'whites'. Social grant provisioning though having already been put in place for the 'white' minority, the Carnegie Commission saw an immediate need for financial support for those white persons. In light of its wide-ranging scope, the Carnegie Commission recommended that ample time (and inevitably other resources) be invested in all other elements, namely; health, psychological, educational, and sociological aspects, given their impact on poverty.¹²⁴

In the 1930s the government began to call for "social policy", describing favourable policies to address poverty.¹²⁵ These social policies were institutionalised within a dedicated Department of Social Welfare, formally part of the then Department of Labour. The view was that, even though poor white people found employment, they remained in need of the state's help.¹²⁶ The late 1930s saw considerable expansion in social assistance.¹²⁷ The elderly, the blind and the disabled, children, and single mothers were then covered. More so that by 1936 pensions had begun to be paid to blind Africans, alongside blind whites and coloureds.¹²⁸

Despite this gradual expansion to include other race groups, the majority sense was still widely discriminatory against Africans and often such expansion was seen as impractical and unaffordable.

2.2.3 Social assistance and apartheid South Africa

The National Party government came to power in 1948 as a result of a class alliance of the Afrikaners.¹²⁹ For about 46 years, this government sought to achieve a system of institutionalised racial discrimination, which came to be notoriously known as apartheid. It is worth noting that there are considerable overlaps between apartheid and colonialism as above discussed. Notwithstanding, there are pertinent differences regarding the emergence of social assistance. This part seeks to demarcate those variables.

¹²⁴ Ibid 323.

¹²⁵ Seekings (n 103) 201.

¹²⁶ Ibid 202.

¹²⁷ In 1937 the unemployment insurance was finally introduced.

¹²⁸ Seekings (n 103) 204.

¹²⁹ Patel (n 87) 48.

The enforcement of apartheid was made through an array of legislation, including outstandingly, the Population Registration Act.¹³⁰ In terms of this legislation, four racial classes were created with the aim of differential access to social welfare resources. This differentiation disproportionately benefitted 'whites' compared to other race groups. Accordingly, the material conditions of 'whites' by the mid-1960s were greatly improved.¹³¹ Compellingly Woolard, Harttgen, and Klasen,¹³² note that social assistance came to serve both social and political objects including advancing varied development as well as political legitimisation of the apartheid state.¹³³ This was an extreme degeneration of the former sporadic strides made during colonialism.

Non-contributory social pensions made up the most expansive social assistance programme and were set up for the 'white' and 'coloured' population from 1928.¹³⁴ By way of stringent eligibility criteria, social assistance excluded the majority of the people mainly 'blacks'. In this regard, Patel identified that "the system of social benefits did not provide a comprehensive safety net, and the unemployed were particularly affected"¹³⁵ (emphasis added).

Despite this fragmented non-contributory system, the broader social security system was largely tied to employment. As such, contributory social insurance schemes played a prominent role.¹³⁶ Given these employment-inclined social benefits, inequalities and divisions deepened as 'black' people were inevitably excluded due to their marginalisation within the formal labour sector. This significantly affected the poorest of the poor including the unemployed, as no avenue for social protection was possible.¹³⁷

One of the earlier attempts at social welfare provisioning was the introduction of an elderly grant in 1928. As indicated above, the

¹³⁰ Act 30 of 1950.

¹³¹ Patel (n 87) 49

¹³² Ingrid Woolard, Kenneth Harttgen and Stephan Klasen, 'The History and Impact of Social Security in South Africa: Experiences and Lessons' (2011) 32 *Canadian Journal of Development Studies* 357-380.

¹³³ See also Patel (n 87) 51.

¹³⁴ Patel (n 87) 54.

¹³⁵ *Ibid.*

¹³⁶ These insurance schemes included retirement and medical benefits, workmen's compensation, unemployment, and maternity benefits.

¹³⁷ There was a stark separation between those who were employed and those who were not, with urban unionised workers being a more privileged sector of the society.

implementation of the old-age pension was made through the OAPA. In terms of this legislation, only white and coloured elderly were eligible, under the racist policies of the time. It was argued that Africans could rely on their rural kinship ties for their social security needs.¹³⁸

The OAPA is one of the oldest social security statutes in South Africa and beyond.¹³⁹ As shown, this early social assistance system vividly perpetuated a hierarchical and racial disparity in non-contributory income support. In addition, the Act was seen as a necessary step in curbing hunger and starvation among elderly whites, including their dependents.¹⁴⁰ This shows how poverty (among other exigencies) played a pre-eminent role in the foundation of social assistance in South Africa, though sadly racialised. As Nkosi highlights, "the analysis of poverty concerning white people was different from that of Blacks".¹⁴¹

In 1937 the net was cast a bit wider, through the introduction of a disability grant. Both the old age pension and the disability grants were only extended to Africans and Indians in 1944.¹⁴² Notwithstanding this inclusion, the amount provided was substantially different among these racial groups. Notably, those who were without formal jobs continued to be unrecognised and had to rely on whatever little their families received.

2.3 Social assistance post constitutionalism

The Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution') acknowledges South Africa's unequal past and affirms to 'heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights.'¹⁴³ In line with this commitment, considerable progress has been achieved in addressing income poverty, unemployment and inequalities. Notwithstanding, an enormous gap is still persistent. This is evinced by the current statistics released by Statistics South Africa, which shows that the rate of

¹³⁸ Pauw (n 114) 12.

¹³⁹ Andreas Sagner, 'Ageing and Social Policy in South Africa: Historical Perspectives with Particular Reference to the Eastern Cape' (2000) 26 *Journal of Southern African Studies* 524.

¹⁴⁰ Ibid 526.

¹⁴¹ Nkosi (n 78) 317.

¹⁴² Sagner (n 139) 524; Pauw (n 114) 12.

¹⁴³ Preamble to the Constitution.

unemployment stood at 35.3 percent in terms of its fourth-quarter labour force survey of 2021.

In South Africa, the development perspective on social welfare is deeply rooted in a rights-centred approach. Patel,¹⁴⁴ notes that at the core of this approach, is a commitment to achieve social justice, a minimum standard of living, and equitable access to opportunities, among others. There also lies in this approach, a pledge to meet the essential needs of all South Africans, 'with a particular emphasis on the needs of the most vulnerable in the society'.¹⁴⁵

The inclusion of the socio-economic right of access to social security, including, social assistance in the Constitution ought to be understood considering the essential changes to the legal system of South Africa.¹⁴⁶ This evolution is primarily characterised by the transition from a system of parliamentary sovereignty to one of constitutional supremacy. The chief strut of the latter is a legally enforceable Bill of Rights.¹⁴⁷ Section 27(1)(c) of the Constitution is one such socio-economic right ingrained in the Bill of Rights.

The transition into a democratic regime was a major milestone, manifested through the foundation of a supreme Constitution.¹⁴⁸ This supreme Constitution incorporates an array of socio-economic rights, reflecting the aspirations of all in South Africa. As Liebenberg underscores, socio-economic rights are regarded as imperative vehicles to facilitate the fundamental transformation of South African society.¹⁴⁹ Regarding social assistance, transitioning to constitutionalism saw one of the most extensive social assistance programmes in the world, reaching many recipients in South African history.¹⁵⁰

¹⁴⁴ Patel (n 87) 82.

¹⁴⁵ Ibid.

¹⁴⁶ Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Co Ltd, 2010) 1.

¹⁴⁷ The Bill of Rights is entrenched in ch 2 of the Constitution.

¹⁴⁸ S 2 of the Constitution titled 'Supremacy of Constitution' states that 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

¹⁴⁹ Liebenberg, 'Socio-Economic Rights' (n 146) 22.

¹⁵⁰ Shirin Motala, Steward Ngandu and Tim Hart, 'Introduction' in Shirin Motala, Steward Ngandu and Tim Hart (eds), *Social Security Review 2021: Evolution of Social Security in South Africa- An Agenda for Action* (Department of Social Security, blackmoon 2021).

Constitutional rights are interdependent.¹⁵¹ More so are socio-economic rights. The Constitutional Court has on various occasions reaffirmed this interdependence.¹⁵² The underlying idea here is that people can have complete enjoyment of their rights only if, they have the economic security to do so.¹⁵³

'[O]ne can understand a right by the company it keeps',¹⁵⁴ Swart figuratively intercepts. As such section 27 of the Constitution vividly captures the social interdependence of human life.¹⁵⁵ Access to the essential needs of life namely, health, food, and water are therefore attainable through social security.¹⁵⁶ Social assistance in the form of social income grants plays a leading role to improve the lives of the underprivileged across these basic necessities.¹⁵⁷

In South Africa, access to social assistance is constitutionally guaranteed yet limited. This access is mandated by policy and legislation. Regrettably in a piecemeal fashion. These include the Constitution, White Paper for Social Welfare (1997) (hereafter 'the White Paper'), the Social Assistance Act,¹⁵⁸ and the South African Social Security Agency Act,¹⁵⁹ to mention but a few. Whereas the White Paper provides guiding aspirations to transform the social welfare system, the SAA (drafted in line with the White Paper) is fraught with eligibility criteria that limit access to social income grants. These limitations jeopardise the socio-economic aspirations of the country.

¹⁵¹ Sandra Liebenberg, 'The Interpretation of Socio-Economic Rights' in Stuart Woolman and Michael Bishop (eds), *Constitutional Law of South Africa (CLOSA)* (2nd edn, RS 4, March 2012) 33-1; Marius Olivier, 'Selected Constitutional and Legal Perspectives on Social Security in South Africa' in Shirin Motala, Steward Ngandu and Tim Hart (eds) *Social Security Review 2021: Evolution of Social Security in South Africa- An Agenda for Action* (Department of Social Security, blackmoon 2021).

¹⁵² See in this regard, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at paras 23 and 83; *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at para 40.

¹⁵³ Mia Swart, 'Social Security' in Stuart Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd edn, RS 4, March 2012) 56D-2.

¹⁵⁴ *Ibid* 56D-4.

¹⁵⁵ Geraldine Van Bueren, 'Health and Social Security' in Halton Cheadle, Dennis Davis and Nicholas Haysom (eds), *South African Constitutional Law: The Bill of Rights* (LexisNexis last updated September 2021).

¹⁵⁶ *Ibid*. S 27 (1)(a) and (b) guarantees '[E]veryone the right to have access to health care; and sufficient food and water' respectively.

¹⁵⁷ Leila Patel, 'Poverty, Gender and Social Protection: Child Support Grants in Soweto, South Africa' (2012) 11 *Journal of Policy Practice* 106.

¹⁵⁸ Act 13 of 2004 (hereafter 'the SAA').

¹⁵⁹ Act 9 of 2004 (hereafter 'the SASSA Act').

Chiefly, the means-testing approach of the SAA differentiates between groups of persons and the amount of grants for each group.

Daringly, section 27(2) of the Constitution demands that reasonable legislative measures must be adopted by the state, to realise everyone's right to have access to appropriate social assistance. Additionally, section 2 states that the Constitution is the supreme law and all obligations imposed by it must be fulfilled. These constitutional injunctions are neither respected nor realised, about the poor and unemployed.

Given this general account of the democratic social assistance scheme, what follows is a discussion on focused areas bearing on the right to social assistance. In particular, section 27(1)(c) of the Constitution. Further, legislation purporting to give effect to this constitutional right are examined.

2.3.1 The constitutional right to social assistance

Section 27(1)(c) of the Constitution states to the necessary extent that:

Health care, food, water, and social security

27 (1) Everyone has the right to have access to –

...

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

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

As above-recited, social assistance is, a constitutional right conferred on 'everyone' who is unable to support oneself and her or his dependants. The expression 'everyone' is typical of most rights in the Bill of Rights.¹⁶⁰ This includes every person present in South Africa as well as non-citizens.¹⁶¹

The text further uses the wording 'access to'. The Constitution refers to the right to have access to social security, and not purely to the right to social

¹⁶⁰ Pierre De Vos and Warren Freedman, *South African Constitutional Law in Context* (OUP 2014) 323. Some rights in the Bill of Rights are qualified in the sense that they are conferred specifically on 'children (s 28)', 'citizens (ss 19, 20 and 22)' or 'detained persons (s35)'.

¹⁶¹ Ibid.

security, *including appropriate social assistance*.¹⁶² In the realm of social welfare, *access* has been a barrier well before democratisation in South Africa. Lund reported in the early nineties, 'Major problems with the system are those of *access*, racial discrimination, inefficiency, corruption, and how the means test is implemented.'¹⁶³ Tshoose contents that, a question must be asked, 'whether the term 'access to' can be interpreted as qualifying or limiting the right to social security, *including, social assistance*'.¹⁶⁴

Interestingly, the Constitution does not only phrase the right to social assistance in this way. Almost all other socio-economic rights are also similarly phrased. In particular the right to health care, food and water, and housing.¹⁶⁵ The nature of the obligations imposed on the state by section 27 is like those imposed by section 26(1) and (2).¹⁶⁶ To that effect, the jurisprudence on the right to housing plays an essential interpretative role over the right to access appropriate social assistance.

In *Government of the Republic of South Africa v Grootboom*,¹⁶⁷ the Constitutional Court acknowledged that 'access to housing' in section 26(1) could be interpreted as a right that extends beyond entitlement to a particular physical structure.¹⁶⁸ According to Liebenberg,¹⁶⁹ this ground-breaking Apex Court judgment recognises that housing requires land availability, appropriate services such as the provision of water, the removal of sewage, and adequate financing.¹⁷⁰ In a similar vein, the right to access social assistance must be understood as extending beyond the payment of

¹⁶² Tshoose, (n 68) 132.

¹⁶³ Francie Lund, 'State Social Benefits in South Africa' (1993) 46 *International Social Security Review* 5.

¹⁶⁴ Tshoose (n 68) 132-133 (emphasis added).

¹⁶⁵ s 26 of the Constitution states on 'Housing' that:

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

¹⁶⁶ Ian Currie and Johan De Waal, *The Bill of Rights Handbook* (6th edn, Juta & Co Ltd 2013) 591.

¹⁶⁷ 2001 (1) SA 46 (CC) (hereafter '*Grootboom*').

¹⁶⁸ *Ibid* para 35.

¹⁶⁹ Liebenberg, 'The Interpretation of Socio-Economic Rights' (n 151) 33-22.

¹⁷⁰ See also Tshoose (n 68) 133.

monthly grants to embrace all welfare measures that could allow people to escape poverty.¹⁷¹

Fulfilling the right to access social assistance could have an impact on the extent to which the other rights have to be fulfilled.¹⁷² The Constitutional Court in *Grootboom* remarked in this regard stated that:

The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependant that would be relevant to the state's obligations in respect of other socio-economic rights.

Swart, citing De Villiers, points out that 'The applicant for a social grant has no substantive right to receive a grant in terms of the SAA but has a right to access to social assistance in terms of section 27(1)(c) of the Constitution.'¹⁷³ Accordingly, 'access' must refer to 'the process by which an individual enters into the social assistance system and must include access to the decision-making process.

Furthermore, this right is also worded in a coupled manner, with the right of access to social security. Therefore, the terms 'social security' and 'social assistance' are garnered from this constitutional provision. It should be highlighted that these terms are sometimes used interchangeably.¹⁷⁴ However, this study does not intend to use them as such.

To have a sound command of the South African social welfare system, a consideration of the two fundamental concepts is inevitable. In general, the term social security is a wide-ranging term that may be used to refer to two interrelated ideals. On the one hand, it refers to directly contributed benefits of workers. On the other hand, non-contributory needs-based income support from public funds for the benefit of the indigent. These latter persons indirectly contribute as members of our society.¹⁷⁵ Olivier concisely asserts:

Social protection systems have, in the wide sense, a "safety net" function and an income maintenance function. Generally, the traditional division of social

¹⁷¹ Swart (n 153) 56D-6.

¹⁷² Tshoose (n 68) 134.

¹⁷³ Swart (n 153) 56D-6. See also Nick de Villiers, 'Social Grants and the Promotion of Administrative Justice Act' (2002) 12 *SAJHR* 322.

¹⁷⁴ Swart (n 153) 56D-3.

¹⁷⁵ Van Bueren (n 155) 14.

security measures into the categories of social assistance and social insurance can be said to be per these stated functions of social protection. Social assistance (fulfilling the safety net function) is thus aimed at ensuring that each member of society who is facing destitution is provided with a minimum level of income, health, and social services to allow the member to lead a socially meaningful life whilst retaining his or her human dignity. Social insurance (fulfilling an income maintenance function) is aimed at permitting the economically active members of society to maintain a decent standard of living during periods when other forms of income are not possible or are limited.¹⁷⁶

The intrinsic relationship between 'social security' and 'social assistance' cannot thus be overlooked. The common denominator underlying the two concepts is 'The use of social means to prevent deprivation and vulnerability.'¹⁷⁷ However, in South Africa, their divide has resulted in a patchwork of fragmented institutions, with no synergy between them.¹⁷⁸

Section 27(2) of the Constitution embraces an aspirational approach to the realisation of the right to social assistance. Unlike civil and political rights and the socio-economic right to 'basic education',¹⁷⁹ the Constitution does not demand immediate realisation of the right to social assistance. However, this wording is not uncommon, particularly regarding socio-economic rights. Sections 27(1)(a) and (b) and 26 also use this language.¹⁸⁰ In terms of section 27(2), 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of *the right to social assistance*.'¹⁸¹

This formulation strikes at the heart of the obligation that rests on the state of ensuring the realisation of the right to social assistance. In this regard, section 7(2) is noteworthy as it places a positive duty on the state to protect, promote and fulfil the rights enshrined in the Bill of Rights.¹⁸² The obligation to respect requires the state and other relevant actors, at a basic level, to

¹⁷⁶ Marius Olivier, 'Social security: Framework' in John Faris (ed), *The Law of South Africa (LAWSA)* (2nd edn Vol 13 Part 2, LexisNexis 2013).

¹⁷⁷ *Ibid.*

¹⁷⁸ The study does not critically analyse the concept of social security owing to its nature and scope. See Tshoose (n 68) for a critical conceptualisation of 'social security'.

¹⁷⁹ S 29(1)(a) of the Constitution.

¹⁸⁰ S 26(2) of the Constitution on the right to 'Housing' states *verbatim* that 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'

¹⁸¹ S 27(2) of the Constitution (emphasis added).

¹⁸² S 7(2) of the Constitution.

refrain from infringing the right.¹⁸³ Section 27(1)(c) accords every person the right not to have his/her access to social assistance subjected to undue and unjustified interference and/or restriction.¹⁸⁴ Accordingly, there is an obligation on the state and other non-state actors to desist from preventing or impairing access to the right to social assistance.

The Constitutional Court indicated concerning the right of access to adequate housing in *Grootboom* that, the Constitution requires the state to devise and implement comprehensive and coordinated programmes and policies to give effect to the right to housing.¹⁸⁵ Mere legislative measures are not enough as the state must act in such a way as to achieve the intended result. Appropriate and well-directed policies and programmes will invariably support legislative measures.¹⁸⁶ Such programmes and policies must be reasonable in their conception and implementation. The programmes must give effect to, and promote all related constitutional rights and values, such as human dignity, equality, freedom, and social justice and must eliminate the large areas of severe deprivation that afflict communities.

The right to have access to social assistance akin to all other socio-economic rights is indeed justiciable. In this regard, there is emerging social assistance jurisprudence, *albeit*, inchoate.¹⁸⁷ The decision of the apex court in *Khosa v Minister of Social Development*,¹⁸⁸ is the leading jurisprudence in this area of law. The judgment concerned an application for the confirmation of the constitutional invalidity of certain provisions of the Social Assistance Act,¹⁸⁹ and the Welfare Laws Amendment Act.¹⁹⁰ These legislation, read together, limited the eligibility of obtaining social assistance to South African citizens only. In this case, the applicants were not South African citizens, but permanent residents. The court ordered that social assistance be extended to permanent residents. This is mandated by section 27(1)(c), the court found.

¹⁸³ Tshoose (n 68) 142.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Grootboom* para 99.

¹⁸⁶ *Grootboom* para 42.

¹⁸⁷ Swart (n 153) 56D-2.

¹⁸⁸ 2004 (6) SA 505 (CC) (hereafter '*Khosa*').

¹⁸⁹ Act 59 of 1992.

¹⁹⁰ Act 106 of 1997.

The interpretation of section 27(1)(c) of the Constitution in *Khosa* is therefore instructive vis-à-vis the unemployed working-age population's right to basic income support. This is because their right to access income support also emanates from section 27(1)(c). In essence, they meet the essential elements of entitlement in terms of the provision. First, they are unable to support themselves and their dependants, and second, the right is conferred on everyone.

It cannot be gainsaid that the right to access appropriate social assistance is restrictively worded. The right covers those 'unable to support themselves and their dependants.'¹⁹¹ Liebenberg contends that this restriction begs the question, "Whom does the Constitution envisage as being 'unable' to care for themselves and their dependants"?¹⁹² It is indisputable that the right extends to those who cannot afford to provide for their own or their dependants' basic needs because they are old, very young or because they are living with a disability. These are the commonplace contingencies that permeate the social assistance framework.

For Liebenberg the critical concern is whether the right has a broader scope, extending to those who are unable to support themselves due to an inability to find employment, incredibly low wages, or insufficient access to productive assets.¹⁹³ The elevated levels of structural unemployment in South Africa support an interpretation that is sufficiently broad to include every person the right should be understood to protect (i.e all those unable to support themselves and their dependants). In addition, jurisprudence suggests that there may be support for including the unemployed in the net of those entitled to claim social assistance in terms of s 27(1)(c).¹⁹⁴

The exclusionary approach to income support is characteristic of the South African social assistance regime. This is the case even after the demise of apartheid.¹⁹⁵ Adults aged 18 to 59 years, falling outside the determined safety net, do not receive any social assistance from the state.¹⁹⁶ This is a

¹⁹¹ s 27(1)(c) of the Constitution.

¹⁹² Liebenberg 'The Right to Social Assistance' (n 75) 234, 239.

¹⁹³ *Ibid.*

¹⁹⁴ *Khosa* para 74. See also *Mashava v President of the RSA and Others* 2004 (12) BCLR 1243 (CC) para 57.

¹⁹⁵ Kumiko Makino, *Social Security Policy Reform in Post-Apartheid South Africa- A Focus on the Basic Income Grant* (Centre for Civil Society 2004) 1.

¹⁹⁶ The SAA determines what type, how much and who is entitled to social grant thereby creating a safety net.

misconceived exclusion by the legislature, based on the perception that this group benefits from the country's employment sector.¹⁹⁷ But facts be faced, South Africa has been suffering from chronic unemployment since time immemorial.¹⁹⁸ This group has been the hardest hit by unemployment, more so since the outbreak of the Covid-19 pandemic.

The perpetual denial to implement basic income support is an unconstitutional violation of the right to access social assistance, guaranteed by the Constitution. This is a further violation of the obligations South Africa has at international and regional levels, towards impoverished and marginalised individuals.

Proper interpretation of the 'interrelated' constitutional text is imperative to an understanding of the rights and obligations it (the Constitution) imposes. From its onset, the Constitution declares its supremacy. Section 2 of the Constitution declares the Constitution as the supreme law of South Africa, against which any law or conduct found to be inconsistent with it, is invalid. Section 2 further demands that obligations imposed by it must be fulfilled. Of these obligations, section 7(2) plainly demands that the state must respect, protect, promote and fulfil the right appropriate social assistance. Social assistance statutes should thus be measured against these constitutional standards, which they purport to give effect. In particular, the SAA proclaims to give effect to section 27(1)(c) of the Constitution.

2.3.2 Legislative framework

Brief introduction

Alongside the Constitution, the White Paper offered important reform objectives on social assistance. Citing Goldblatt, Swart contends that because of the White Paper's interventions, South Africa now has 'one of the most extensive welfare systems in the developing world.'¹⁹⁹ As such, understanding the social assistance legislative framework merits a brief overview of the White Paper.

The White Paper identified the following key restructuring priorities:

¹⁹⁷ Lithalethemba Stwayi, 'The Need for a Basic Income Grant' (LLM mini-dissertation, University of Pretoria 2018) 17.

¹⁹⁸ See ch 2 of this study for an overview of this historical account.

¹⁹⁹ Swart (n 153) 56D-19.

- a) Building consensus around a national restructuring of the social policy framework;
- b) The phasing out of all disparities in social welfare; and
- c) Developing a financially sustainable welfare system

The purpose of the SAA is to effect these priorities and ensure that national standards are set for the effective use of the limited resources available to the state to give content to social security and social assistance.²⁰⁰

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

The South African social security system through legislation, makes provision for access to and regulation of the delivery of social grants. In addition, they provide legal remedies and adjudication measures for individuals and groups of persons. The SAA and the SASSA Act comprise this framework. Noteworthy, considerable challenges were levelled against these legislation by individuals and civil society organisations that resulted in various amendments.²⁰¹

Social Assistance Act 13 of 2004 ('SAA')

The SAA is the primary social assistance statute and provides eligibility criteria to assess who qualifies for a social grant and what form of a social grant.²⁰² As a general rule, social grants are paid subject to a means test. Means testing implies the evaluation, by the responsible agency, of the income and assets of the person applying for the social grant to establish whether the person's means are below a stipulated amount. The applicable means test varies from one social grant to another. The separate urban and

²⁰⁰ Ibid 56D-20.

²⁰¹ Patel, 'Social Welfare and Social Development' (n 87) 167.

²⁰² Ss 5-13 of the SAA.

rural income thresholds that existed previously have been removed.²⁰³ Social security under the apartheid government was described as 'fragmented, inequitable and fraud-ridden.'²⁰⁴

Despite abolishing the historical rural-urban threshold divide, the current mean test approach under the SAA still perpetuates inequality towards the unemployed working-age population falling outside the safety net, to access social assistance. In one sense, only South African citizens, permanent residents, and refugees qualify for social grants. In the other sense, those who are poor and belong to the categories specified in the SAA are entitled to receive social grants.²⁰⁵

The SAA provides for several types of social grants and their corresponding eligibility requirements. These cover specific groups of persons in need namely, the young (those aged 0- 18 years old),²⁰⁶ the disabled,²⁰⁷ and the elderly (those aged 60 years and above),²⁰⁸. The Act further makes available the unconventional, social relief of distress grant in terms of section 13.

Social relief is defined in the Fund-Raising Act,²⁰⁹ as the alleviation of the need of persons through the temporary rendering of material assistance to them. Further, it entails short-term measures undertaken by the state and other private organisations to assist persons during individual or community crises that have caused the affected persons or communities to be unable to meet their most.²¹⁰ Social relief of distress grant has never formed an important part of welfare expenditure.²¹¹ Lund observed that the so-called social relief of distress has historically accounted for the least portion of distribution compared to other forms of social grant benefits.²¹²

South African Social Security Agency Act 9 of 2004 ('SASSA Act')

²⁰³ National Treasury 'National Budget Review: 2009' [2009] 89 <[www.treasury.gov.za/ documents/national%20budget/2009/review/](http://www.treasury.gov.za/documents/national%20budget/2009/review/)> accessed 04 March 2022.

²⁰⁴ Swart (n 153) 56D-19.

²⁰⁵ Olivier, 'Selected Constitutional and Legal Perspectives' (n 151) 22.

²⁰⁶ These grants are the Child Support Grant (s 6), the Care Dependency Grant (s 7) and the Foster Care Grant (s 8).

²⁰⁷ Disability grant (s 9) and Grant-in-aid (s 12).

²⁰⁸ Older persons grant (s 10) and War veterans grant (s 11).

²⁰⁹ Act 107 of 1978.

²¹⁰ Tshoose (n 68) 104.

²¹¹ Lund (n 163) 12.

²¹² Ibid 10.

The agency responsible for the delivery of social grants is the South African Social Security Agency (hereafter 'SASSA'). Noteworthy, SASSA was established pursuant to a recommendation by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002) (hereafter 'the Taylor Committee'). As a creature of statute, SASSA is a juristic person and is intended to be the sole agent that ensures the management, administration, and payment of social assistance. In recent years, it is disappointing that SASSA has been failing dismally to uphold these core objectives. The agency has been fraught with devastating maladministration threatening the right to access social assistance for millions of South Africans.²¹³

SASSA was founded in terms of the SASSA Act.²¹⁴ The purpose of the SASSA Act is to ensure that national standards are set for the efficient and effective use of the limited resources available to the state for social security. SASSA is mandated to serve as an agent for the payment of social security. Its functions are described in Chapter 3 of the SAA and include collecting, collating, maintaining, and administering the information necessary for the payment of social security in a national database.

In addition to this statutory backing, South Africa has government policies, the most important of which is the National Development Plan ('NDP') 2030. The NDP aims, by the year 2030, to eliminate poverty and reduce inequality. Outcome 13 talks about 'an inclusive and responsive social protection system'. According to the NDP, 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."

2.4 Summary

The pertinent social welfare systems under both colonialism and apartheid were intolerant of the indigenous African people of South Africa. These sadly also denigrated and disrupted the already established largely informal, communist African systems of social protection. The political and social arrangements were defined predominantly by 'white' privilege.²¹⁵ These

²¹³ See in this regard the judgment of the Constitutional Court in *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) ('*Black Sash 1*'). See also the unanimous judgement of Justice Froneman in *Black Sash Trust v Minister of Social Development* 2018 (12) BCLR 1472 (CC) ('*Black Sash 2*').

²¹⁴ The SASSA Act can into effect on 15 November 2004.

²¹⁵ Seekings (n 103) 193.

systems mainly recognised the so-called 'white' poverty and 'black' people had limited, to no place within those state social welfare provisions. In this context, demands for policy reforms were understood in very diverse ways.

Unsurprisingly, added to this racialisation of the provision of social welfare, the unemployed working-age group was particularly an outcast. This pre-constitutional dispensation was based squarely on inequality concerning social assistance as a social ideal, among others.²¹⁶ Aptly described by the Constitutional Court per O'Regan J in *Brink v Kitsoff*,²¹⁷ indigenous African people of South Africa were systematically discriminated against, in all aspects of social life, in that:

Black people were prevented from becoming owners of property or even residing in areas classified as 'white' which constituted nearly 90 per cent of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society.²¹⁸

It is through these 'deep scars'²¹⁹ that the majority of black South Africans still endure profound social-economic marginalisation. This disheartening reality persists despite the constitutional guarantee of the right of everyone to social assistance. And this calamity is most felt by the working-age population aged 18 to 59 years of age. The demise of this working-age population is an issue of less concern (also) to the democratic government. Arguably, a perpetuation of the 'appalling programme' of the past. It is from this agonising contextual beginning that persons aged between 18 and 59 receive no income support today, despite their inability to care for themselves and their dependants.

South Africa regulates social assistance essentially through enabling legislation. The SAA, including the subsequent policies adopted by the government, show the reluctance of the government to 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

²¹⁶ Currie and De Waal n 166 above.

²¹⁷ 1996 (4) SA 197 (CC) (hereafter '*Brink v Kitsoff*').

²¹⁸ *Brink v Kitsoff* at para 40. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at para 7.

²¹⁹ *Brink v Kitsoff* at para 40.

the right to social assistance for all as envisaged in the Constitution. It has advocated for job creation and stimulating the economy to create those jobs. Sadly, this has not yielded the required and expected result, leading to the continued destitution of the unemployed working-age population aged 18-59. Covid-19 has indisputably exacerbated their vulnerability.

This deprivation continues despite a myriad of human rights instruments, not only in the national sphere, but also at the international, and regional spheres that guarantee a right and/or entitlement to social assistance today. Over and above, South Africa boasts a liberal constitution that provides for the right to access appropriate social assistance to everyone unable to support themselves and their dependants. Moreover, it unequivocally recognises the place and worth of international and regional law, instrumental in safeguarding this fundamental human right. The succeeding chapter traverse these two frameworks.

Chapter 3
INTERNATIONAL AND REGIONAL SOCIAL ASSISTANCE
FRAMEWORK

Contents

3.1 Introduction	44
3.2 The international level	45
3.2.1 International Labour Organisation (ILO)	49
3.2.2 Universal Declaration of Human Rights, 1948 (UDHR)	52
3.2.3 International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)	53
3.3 The regional level	57
3.3.1 African Charter on Human and Peoples' Rights.....	57
3.3.2 Southern African Development Community (SADC)	61
3.4 Summary	62

3.1 Introduction

The Basic Income Grant (BIG) or the Universal Basic Income Grant (UBIG) concepts have dominated welfare policy debates across the globe. Despite this, implementation is widely lacking. As noted in the preceding chapter, South Africa's BIG discourse has lain dormant for over two decades since it was expertly recommended soon after the attainment of democracy. In light of this, this chapter examines the place occupied by both international and regional laws, in South African social assistance law. Accordingly, the Constitution is lauded for its unequivocal commitment to international and regional law, when interpreting the constitutional right guaranteed by section 27(1)(c).²²⁰ Equally, section 233 of the Constitution enjoins the preference of reasonable construal of international law when courts interpret the Social Assistance Act.

This chapter, therefore, traverses the social assistance framework bearing on South Africa from two cross-cutting levels namely, regional, and international. It inquires whether persons aged between 18 and 59 years are protected against the vulnerabilities of income poverty, joblessness, and inequality. In conclusion, it is argued that a case can be made for the need and feasibility of the BIG in South Africa, on account of this framework.

3.2 The international level ²²¹

Tshoose, taking his cue from Smit and Van Eck, maintains that 'No man is an island, entire of itself; every man is a piece of the continent.'²²² This assertion is more relevant today, due to exponential global ties. Essentially, when one considers the movement of capital, goods, and labour across international borders, these ties create a situation where uniform standards become relevant.²²³

²²⁰ S 39(1)(b) of the Constitution.

²²¹ International law may be divided into two 'public' and 'private' international law. The former regulates the relations between states, whereas the latter concerns the relations between individuals whose legal relations are governed by the laws of different states. The concern of this study is public international law.

²²² Clarence Tshoose, 'Social Assistance: Legal Reform to Improve Coverage and Quality of Life for the Poor People in South Africa' (LLD thesis, University of South Africa 2016) 211.

²²³ Ibid.

One of the foremost aims of international law is the protection of the human rights of individuals against her or his or their own state.²²⁴ There are many reasons why international law must be considered in the context of the right to social security,²²⁵ including social assistance.

International law is described as the normative body of rules and principles that are binding upon and govern the relationship between and among states.²²⁶ Contemporary international law concerns itself not only with the relationships between states but also with international organisations, states, and individuals in the international arena.²²⁷ These relations are chiefly regulated by Declarations, Covenants, and Conventions. South Africa is a party state under these instruments and thus bound by them. Therefore, the standards of the right to social assistance lauded by them should be endorsed in South Africa. The role of international law in South African law cannot, therefore, be gainsaid.²²⁸

The Constitution imposes an obligation on South Africa to ensure universal access to social security.²²⁹ Sections 39(1)(b) and 233 of the Constitution are the most notable provisions on the interpretation of the Bill of Rights, in particular, 'the right to access social assistance' in international law. Section 233 of the Constitution enjoins our courts to prefer interpretations of statutes that are in harmony with international law, over any other interpretation that is inconsistent therewith. Accordingly, the Social Assistance Act must be understood in light of international social security standards. As Olivier,²³⁰ avers sections attest to the international law-friendly approach of our constitutional order. International law is, so, a vital

²²⁴ John Dugard and Jackie Dugard, 'Human Rights' in John Dugard *et al* (eds) *Dugard's International law: A South African Perspective* (5th edn, Juta & Co Ltd 2017) 454.

²²⁵ Mia Swart, "Social Security" in Stuart Woolman and Michael Bishop (eds), *Constitutional Law of South Africa (CLOSA)* (2nd edn RS 4 Vol 4, Juta & Co Ltd 2012) 56D-29.

²²⁶ Hennie Strydom and Kevin Hopkins, 'International Law' in Stuart Woolman and Michael Bishop *Constitutional Law of South Africa (CLOSA)* (2nd edn RS 4, Juta & Co Ltd March 2012) 30-1; John Dugard, 'Introduction' in John Dugard *et al* (eds) *Dugard's International law: A South African Perspective* (5th edn, Juta & Co Ltd 2017) 1.

²²⁷ Dugard (n 226 above). See also Marius Olivier, 'Social security: Framework' in John Faris (ed), *The Law of South Africa (LAWSA)* (2nd edn Vol 13 Part 2, LexisNexis 2013).

²²⁸ Strydom and Hopkins (n 226) 30-2.

²²⁹ Tshoose (n 222) 132.

²³⁰ Olivier, 'Social Security' (n 227 above).

part of the South African constitutional dispensation,²³¹ and occupies a special place in our law.²³²

The Constitution demands that courts, tribunals, and fora consider international law when interpreting the Bill of Rights.²³³ Accordingly, whenever the right of access to social assistance is in issue, courts are obliged to consider international law.²³⁴ Section 39(1)(b) is thus important as it guides how courts ought to interpret section 27(1)(c) to the best possible defence of this right.²³⁵

Moreover, the Constitution requires courts to prefer interpretations consonant with international law when construing legislation.²³⁶ This includes social assistance legislation. The Constitution states that 'when interpreting any legislation, courts must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.²³⁷ Section 233 equally ensures that courts interpret social assistance legislation, such as the SAA, in a manner that upholds international law of social welfare.

Critically then, how does international social welfare law bind, South Africa? This issue is important so that we understand how courts perform their entrusted responsibilities; first, of *considering* international law, as sanctioned by section 39(1)(b). And second of *preferring* reasonable interpretation of legislation consistent with international law over any inconsistent alternative, as sanctioned by section 233. The answer is found in the approaches to international law as expounded by Dugard.²³⁸

He asserts that two main approaches regulate the relations between international law and national law (i.e monism and dualism). On the one

²³¹ Tshoose (n 222) 233.

²³² John Dugard and Andreas Coutsoudis, 'The Place of International Law in South African Municipal Law' in John Dugard *et al* (eds) *Dugard's International Law: A South African Perspective* (5th edn, Juta & Co Ltd 2018) 66. See also the comment of Ncgobo CJ (as he then was) in *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 97.

²³³ S 39(1)(b) of the Constitution.

²³⁴ The right of access to social assistance is a right in s 27(1)(c) of the Bill of Rights.

²³⁵ Lithalethemba Stwayi, 'The Need for a Basic Income Grant' (LLM mini-dissertation, University of Pretoria 2018) 27.

²³⁶ S 233 of the Constitution.

²³⁷ *Ibid.*

²³⁸ Dugard and Coutsoudis (n 232) 57-58.

hand, monists argue that international law is part of municipal law, thus no act of adoption by courts or transformation into legislation is needed before international law applies to South Africa.²³⁹ As such courts may apply international law directly.²⁴⁰ On the other hand, dualists argue that international law and municipal law are entirely different systems of law. Accordingly, there should be the adoption and transformation of international law into municipal law. Dugard and Coutsooudis contend that it is an undeniable fact today that international law is applied in municipal courts more often than in the past, notwithstanding the jurisprudential basis of municipal courts.²⁴¹

Fascinatingly, South Africa does not follow either one of these approaches, but both. There is therefore a mixed approach that emerges from the South African legal landscape. In addition to section 233 as above expounded, this approach is explicitly provided by sections 231 and 232 of the Constitution.²⁴² This is how: First, an international agreement binds the Republic only after it has been approved by resolution in both Houses of Parliament.²⁴³ It then becomes law after transformation into legislation.²⁴⁴ Second, there lies an exception to the preceding in as far as self-executing

²³⁹ Tshoose (n 222) 227; Dugard and Coutsooudis (n 232) 57.

²⁴⁰ Dugard and Coutsooudis (n 232) 57; Stwayi (n 235) 29.

²⁴¹ Dugard and Coutsooudis (n 232) 58.

²⁴² Headed 'International agreements', s 231 states that:

" ...

(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.

..."

S 231 headed 'Customary international law' states further that, "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

²⁴³ S 231 (2) of the Constitution. The two Houses of Parliament (also known as the Bicameral Parliament) consists of the National Assembly and the National Council of Provinces.

²⁴⁴ S 231 (4) of the Constitution.

provisions in a treaty approved by Parliament are binding without enactment into legislation, provided they do not contravene the Constitution or legislation.²⁴⁵ Finally, customary international law²⁴⁶ assumes a status similar to all other laws in the Republic, unless it contradicts the Constitution or legislation.²⁴⁷ Customary international law is therefore no longer subject to subordinate legislation and, only the two trump it in case of inconsistencies.²⁴⁸ As such, no transformation and adoption are necessary before customary international law may be applied by courts.

In South Africa and internationally, social development is an emerging approach to social welfare.²⁴⁹ Although a litany of international instruments can and should aid in the interpretation of the right to social security, including, social assistance,²⁵⁰ this study focuses on the most prominent. These are the Universal Declaration of Human Rights of 1948, the International Labour Organisation's (ILO) Social Security Minimum Standards Convention of 1952, and the International Covenant on Economic, Social and Cultural Rights of 1966. South Africa is legally bound by these international instruments.

3.2.1 International Labour Organisation (ILO)

In the context of social security, the development of ILO international standards can be traced to the first era that lasted from 1919 to 1944.²⁵¹ From its inception, the ILO was created to improve the working conditions of employees. Hence, most of the standards envisaged social insurance as the means for their application. The objective of these standards is the establishment of compulsory insurance schemes for a specific branch of social security (i.e unemployment, industrial accidents, occupational diseases, sickness, old age, invalidity, and death) as defined in the

²⁴⁵ S 231 (3) of the Constitution.

²⁴⁶ As Strydom and Hopkins (n 226) 30-4 assert, "Customary international law is that source of international law developed through state custom or practice. It is the 'common law' of the international legal system." See also *The Asylum Case (Colombia v Peru)* 1950 ICJ Reports 266.

²⁴⁷ S 232 of the Constitution.

²⁴⁸ Dugard and Coutsoodis (n 232) 67.

²⁴⁹ Leila Patel, *Social Welfare and Social Development* (2nd edn, OUP 2015) 122.

²⁵⁰ Swart (n 225) 56D-30; Tshoose (n 222) 215.

²⁵¹ Tshoose (n 222) 220.

Convention.²⁵² The ILO has developed a couple of hundreds of conventions and recommendations in the realm of industrial relations.²⁵³

The Social Security (Minimum Standards) Convention No 102, 1952

In 1952, the ILO adopted Convention 102 Social Security (Minimum Standards). As Olivier observes, ILO Convention 102 was developed at a time when it was believed that the goal of full employment, in the formal sector sense of the word, was achievable.²⁵⁴ The Convention, as its title foreshadows, seeks to set out the minimum standards that States signatories to the Convention should provide for their people.²⁵⁵ This Convention is lauded as a milestone in the standard-setting activities of the ILO.²⁵⁶ Convention 102 covers nine social risks. Each part of the Convention provides specific standards aimed at guaranteeing the benefits of social security.²⁵⁷ Confirmed as an up-to-date standard by the decision of the Governing Body of the ILO in 2001, and recognised by the International Labour Conference in 2011, as a benchmark and reference in the gradual development of comprehensive social security coverage at the national level, Convention 102 has been ratified by 48 ILO Member States since it entered into force in 1952, and more ratifications are expected in the years to come.

Convention 102 was designed to accommodate and provide flexibility for, developing countries. Article 3 of Convention 102 allows a state, in the case of insufficient medical or financial capacity, to ratify the Convention and avail itself temporarily of less stringent conditions concerning the duration of benefits and categories of protected persons. This flexibility clause eases compliance but encourages the adoption of Convention 102. Effectively, this excludes a vast majority of people in developing worlds from coverage.²⁵⁸ Although South Africa has not signed or ratified Convention 102, the

²⁵² Ibid.

²⁵³ Dugard and Dugard (n 224) 489.

²⁵⁴ Marius Olivier, 'International Labour and Social Security Standards: A Developing Country Critique' in Marius Olivier, Ockert Dupper and Avinash Govindjee (eds), *The Role of Standards in Labour and Social Security Law: International, Regional and National Perspectives* (Juta & Co Ltd 2013) 23.

²⁵⁵ Isobel Fryer, 'South African Social Security Policy and the Human Rights Based Approach: A Review' in Shirin Motala, Steward Ngandu and Tim Hart (eds) *Social Security Review 2021: Evolution of Social Security in South Africa- An Agenda for Action* (Department of Social Development, Blackmoon 2021).

²⁵⁶ Tshoose (n 222) 221.

²⁵⁷ Swart (n 225) 56D-30.

²⁵⁸ Olivier, 'International Labour and Social Security Standards' (n 254) 24.

Convention remains a vital guide to determining the minimum social security obligations imposed by international labour and social security law.

Nevertheless, in the primary, Convention 102 has a strong insurance bias and the modalities for universal coverage and/or social assistance measures have not at all been developed in the Convention.²⁵⁹ From a developing country perspective, like South Africa, the realities of chronic unemployment mean that only a minority fit this 'industrial socio-Professional model'.²⁶⁰ As a result, the traditional ILO conventional model has a marginalising effect, as the majority of South Africans are unemployed (or at least informally employed). Consequently, far from the reach of its (Convention 102) standards of protection. While the human right to social security, including, social assistance applies to everyone, Convention 102 is already satisfied when a certain percentage of the (employed) population is covered.²⁶¹

The Social Protection Floors Recommendation 202, 2012

As a result, in part, of the limitations of Convention 102 discussed above, the widely endorsed concept of the Social Protection Floor permeated the international social protection discourse.²⁶² In 2012, the ILO adopted Recommendation 202 concerning *National Floors of Social Protection*. Recommendation 202 is the first ILO instrument that codified about sixteen central principles of social security, instead of only providing technical minimum norms. These core principles are in many respects typical of socio-economic rights.²⁶³ Accordingly, their usefulness cannot be underestimated and can serve as interpretative aids.

Paragraph 4 of Recommendation 202 states that:

Members should, in accordance with national circumstances, establish as quickly as possible and maintain their social protection floors comprising basic social security guarantees. The guarantees should ensure at a minimum that, over the life cycle, all in need have access to essential health care and to basic income

²⁵⁹ Ibid 23. See also Gijsbert Vonk, 'The Social Protection Floors Recommendation 2012 (no 202): The Human Rights Approach to Social Security in ILO Wrapping Paper' in Marius Olivier, Ockert Dupper and Avinash Govindjee (eds), *The Role of Standards in Labour and Social Security Law: International, Regional and National Perspectives* (Juta & Co Ltd 2013) 31.

²⁶⁰ Vonk *ibid*.

²⁶¹ Vonk *ibid*.

²⁶² Olivier, 'International Labour and Social Security Standards' (n 254) 25.

²⁶³ These principles are listed in para 3 of Recommendation 202.

security which together secure effective access to goods and services defined as necessary at the national level.

In particular, paragraph 5(c) further avers that the protection floor should at the very least provide, 'Basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity, and disability.'²⁶⁴

Recommendation 202 represents a break from the decades-long standard-setting approach of the ILO.²⁶⁵ Olivier, posits that Recommendation 202 is instrumental in fighting poverty, as a result of its focus on the poor, through the establishment and maintenance by states of nationally-defined social protection floors comprising *inter alia* basic income protection for those unable to earn a sufficient living.

3.2.2 Universal Declaration of Human Rights, 1948 (UDHR)

Article 1(3) of the UN Charter provides for the pursuit of international cooperation by resolving international problems of economic, social, and cultural character, promoting and encouraging respect for human rights and fundamental freedoms for all without distinction. To this end, the United Nations has embarked on the continuous process of articulating human rights to translate them from morality and principles into binding international law. These standards are the result of gradual evolution over several decades with the participation of United Nations bodies, many nations, non-governmental organizations, and individuals.

The adoption of the Universal Declaration of Human Rights (hereafter 'the UDHR') in 1948, was the first step toward the progressive codification of international human rights. The racial inclines that characterised South Africa's social welfare policy featured on the agenda of the General Assembly from 1946 to 1994.²⁶⁶The UDHR's influence on contemporary social welfare remains intact. This Declaration is not a treaty but a recommendary resolution of the General Assembly and is therefore

²⁶⁴ Para 5(c) of Recommendation 202.

²⁶⁵ Vonk (n 259) 41.

²⁶⁶ Dugard and Dugard (n 224) 457. The United Nations General Assembly is the main deliberative, supervisory and reviewing organ of the United Nations. It is composed of representatives of all Member States, each one having one vote. Most decisions are reached by simple majority. Decisions on important questions such as peace, admission of new members and budgetary matters, require a two-thirds majority.

generally not legally binding. It is not surprising then that it proclaims economic, social, and cultural rights in the language of aspiration.²⁶⁷

Social rights are associated with the normative theory of dignity, human rights, and freedom.²⁶⁸ Dignity is offered as a key normative justification in article 1 of the UDHR. It provides as follows:

[A]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.²⁶⁹

The UDHR has an immense influence on human rights and has inspired various human rights conventions and covenants, regionally and internationally. The two prominent international covenants are the International Covenant on Civil and Political Rights ('the ICCPR'), and the International Covenant on Economic, Social, and Cultural Rights both adopted in 1966. This study focuses on the latter. In Africa, the notable regional influence of the UDHR is expressed in the African Charter on Human and People's Rights of 1981.

The UDHR is today argued to form part of customary international law. As such, it is an instrument that the South African judiciary can look into in their interpretation of the Bill of Rights. Especially, the right to access social assistance. Accordingly, as noted above, section 232 of the Constitution makes the UDHR part of South African law 'unless it is inconsistent with the Constitution or an Act of Parliament.'

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

The ICESCR adopted in 1966 is the cornerstone of socio-economic rights in international law.²⁷⁰ In many respects, greater international attention has been given to the promotion and protection of civil and political rights rather than to social, economic, and cultural rights, leading to the erroneous presumption that violations of economic, social, and cultural rights were not subject to the same degree of legal scrutiny and measures of redress. This

²⁶⁷ Dugard and Dugard (n 224) 460.

²⁶⁸ Tshoose (n 222) 122. It is interesting to note that, all three normative theories are lauded by s 1 of the Constitution as 'values' on which constitutional South Africa is founded.

²⁶⁹ Art 1 of the UDHR.

²⁷⁰ Tshoose (n 222) 244.

view neglected the underlying principles of human rights. Rights are indivisible and interdependent and therefore the violation of one right may well lead to the violation of another.

The ICESCR effectively translated the principles of the UDHR into treaty law. Significantly, article 2 outlines the legal obligations which are incumbent upon state parties under the Covenant. States are required to take positive steps to implement these rights, to the maximum of their resources, to achieve the progressive realisation of the rights recognised in the Covenant, particularly through the adoption of domestic legislation.

South Africa signed the ICESCR in 1994, but only ratified it on 12 January 2015. This is an astonishing 20 years wait before South Africa fully bound itself to the ICESCR. This is perplexing because the socio-economic rights in the Constitution were inspired by the ICESCR itself.²⁷¹ Be that as it may, the right to social security is guaranteed by article 9 and commits states parties to 'recognise the right of everyone to social security, including social insurance.'²⁷²

Whereas article 2 of the ICCPR (an ICESCR counterpart) requires the immediate realisation of civil and political rights, article 2 of the ICESCR only requires states to 'take steps... to the maximum of its available resources, to achieve progressively the full realisation of the *right to social security* by all appropriate means.'²⁷³ At this juncture, it is noteworthy that section 27(2) of the Constitution follows the ICESCR formulation in that the Constitution compels the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of *the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance*.'²⁷⁴

The Committee on Economic, Social, and Cultural Rights (hereafter 'the CESCR') is responsible for overseeing the implementation of the ICESCR. The Committee carries out this responsibility in three key ways: through state reports, general comments, and individual complaints. Proudly,

²⁷¹ Dugard and Dugard (n 224) 471.

²⁷² Art 9 ICESCR.

²⁷³ Art 2 of the ICESCR (emphasis added).

²⁷⁴ S 27(1)(c) of the Constitution (emphasis added).

Professor Sandra Liebenberg was elected in 2016 to serve as a member of the CESCR.²⁷⁵

The CESCR declared on the realisation of social and economic rights in General Comment 3 that it (i.e the CESCR):

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, 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. If the Covenant were to be read in such a way as not to establish such a minimum obligation, it would largely be deprived of its *raison d' être*. By the same token, it must be noted that any assessment as to whether a state has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obliges each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.²⁷⁶

Despite this, the apex Court of South Africa in several important cases refused to interpret the socio-economic rights in the Constitution, notably sections 26 and 27, to require a minimum core obligation as declared by the CESCR. Considerable criticism has been levelled against this refusal to adopt the concept of a minimum core obligation as a basic threshold.²⁷⁷ The Constitutional Court instead resorted to the test of reasonableness review to define the content of the relevant socio-economic rights.²⁷⁸

In *Mazibuko v City of Johannesburg*,²⁷⁹ the Court declined to quantify the amount of water sufficient for a dignified life. The concept of minimum core

²⁷⁵ Dugard and Dugard (n 224) 472.

²⁷⁶ CESCR General Comment 3, 'The Nature of States Parties' Obligations (art 2, part 1)' (1994) 1 *IHRR* 6 para 10.

²⁷⁷ Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Co Ltd, 2010) 163.

²⁷⁸ Liebenberg, *ibid* 164.

²⁷⁹ 2010 (4) SA 1 (CC) (hereafter *Mazibuko*).

obligation supposedly creates the danger that courts will transgress the boundaries of their institutional legitimacy and competence.²⁸⁰ However, as the *Grootboom* and *Khosa* cases illustrate, reasonableness review inevitably also results in the courts making orders that have specific implications for government policy. As Liebenberg argues, this is the exact function of judicial review of fundamental rights entrenched in a supreme Constitution.²⁸¹

Bilchitz summarises the role of the minimum core obligation in the following sentiments:

The minimum core obligation protects people's urgent threshold interests in survival, 'as the inability to survive wipes out all possibility for realising the sources of value in the life of a being.'²⁸²

Accordingly, without meeting the minimum essential needs which people desperately need to survive, the obligation of the state to progressively achieve the full realisation of the right to social assistance is nothing short of meaningless.

At the outbreak of Covid-19, survival was of paramount importance to most of the people of South Africa, especially the unemployed working-age group. This pandemic has unfortunately exacerbated the unfortunate circumstances that this group has been facing since time immemorial. Glaringly, deprivation of income support persists notwithstanding archaic laments for the implementation of the BIG.

The BIG is an income support policy that could see a significant decrease in income inequality and poverty among the working-age group, thus enhancing their meaningful participation in the socio-economic landscape of our country.-

²⁸⁰ Liebenberg, (n 277) 165.

²⁸¹ Ibid.

²⁸² David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007) 40, 188.

3.3 The regional level

Human rights law in the regions has grown beyond the exclusive concern of individual countries like at the international level.²⁸³ Regional regimes play a crucial role in the development of socio-economic rights in the three regions of the world.²⁸⁴ These regional instruments complement and reinforce universal human rights conventions.²⁸⁵

Compared to their international counterparts, these regional conventions, are arguably more successful. Dugard and Dugard argue that this is due to political and cultural sameness and common judicial traditions and institutions within each of these regions.²⁸⁶ These commonalities accordingly instil confidence in the system, which is vital for effective implementation. However, they are not themselves without shortcomings. Recent years saw issues of enforcement of decisions as well as legitimacy concerns in the face of increasing resistance from national governments over perceived sovereignty issues.²⁸⁷

3.3.1 African Charter on Human and Peoples' Rights

In the African continent, to which this study is concerned, the African Charter on Human and Peoples' Rights (hereafter 'the ACHPR' or 'the Banjul Charter'²⁸⁸) is the main human rights instrument that sets out the rights and duties relating to human and people's rights.²⁸⁹ The Banjul Charter was approved by the Organisation of African Unity (hereafter 'the OAU') in 1981 and subsequently came into effect on 21 October 1986. South Africa ratified it on 09 July 1996.

The transition from OAU to the African Union (hereafter 'the AU') has been relatively well-received by African nations.²⁹⁰ One of the foremost criticisms

²⁸³ Stwayi (n 235) 35. Three regional human rights regimes have been established in Europe, the Americas and Africa.

²⁸⁴ Tshoose (n 222) 251.

²⁸⁵ Dugard and Dugard (n 224) 489.

²⁸⁶ *Ibid.*

²⁸⁷ Dugard and Dugard (n 224) 490.

²⁸⁸ OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) <www.achpr.org/legalinstruments/detail?id=49> accessed 08 March 2022. The ACHPR was ratified by 54 Member States of the African Union. The latest AU Member state to become a Party to the ACHPR is the Republic of Sudan, as of 23 October 2013.

²⁸⁹ *Ibid.*

²⁹⁰ Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) 151.

levelled against the OUA in over 37 years of its being, was its failure to address the systematic encroachment of human rights in Africa.²⁹¹ The purpose of the AU includes, inter alia, coordinating and intensifying regional cooperation and efforts to achieve a better life for the 'peoples' of Africa.²⁹² This purpose puts extensive obligations on Member states to ensure that they put in place systems of social protection that give effect to the obligations so incurred.

The ACHPR is widely known as the first international human rights treaty to protect the three 'generations' of human rights.²⁹³ This means civil and political rights; economic, social, and cultural rights; and group and peoples' rights, in a single instrument, without drawing any distinction between the justiciability or implementation of the three 'generations' of rights.²⁹⁴

Despite this laudable development, the ACHPR adopts a minimalist approach to socio-economic rights.²⁹⁵ There is neither mention of the right to food, access to adequate housing, nor the right to social security.²⁹⁶ However, through its generous interpretations, the African Commission on Human and People's Rights (hereafter 'the African Commission') offers helpful guidance to ensure that these unwritten rights are protected through other socio-economic rights explicitly protected under the ACHPR.²⁹⁷ Accordingly, only a tangential right to social security (including social assistance) is recognised under article 18(4). This article provides that, 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.'²⁹⁸

²⁹¹ Max de Plessis and Tiyanjana Maluwa, 'The African Union' in Dugard *et al* (eds) *Dugard's International Law: A South African Perspective* (5th edn, Juta & Co Ltd 2018) 816.

²⁹² *Ibid* 800.

²⁹³ Viljoen (n 290) 11-12. On the 'three generations of human rights' see Viljoen (n 290) 5-6.

²⁹⁴ Manisuli Ssenyonjo, 'Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission' (2011) 29 *Netherlands Quarterly of Human Rights* 359.

²⁹⁵ *Ibid*. The ACHPR only explicitly recognises a limited number of socio-economic rights including, the right to property (art 14); the right to work under equitable and satisfactory conditions (art 15); the right to enjoy the best attainable state of physical and mental health (art 16); the right to education (art 17(1)); and, the protection of the family and cultural rights (arts 17(2) and (3), 18(1) and (2) and 61).

²⁹⁶ Du Plessis and Maluwa (n 291) 820.

²⁹⁷ *Ibid* 820.

²⁹⁸ A 18(4) of the ACHPR.

The African Commission is the principal oversight body on the implementation of the ACHPR.²⁹⁹ The main function of this Commission is to promote human rights by way of public education.³⁰⁰ Critically, it has passed several resolutions and recommendations giving content to the Banjul Charter. For instance, the African Commission has encouraged governments to establish national commissions of inquiry for human rights.³⁰¹ These resolutions aid in defining the content of the rights in the ACHPR and condemns human rights violations, among others. However, only a few cases have been brought before the Commission.³⁰²

The African Commission has held that the right to social security 'can be derived from a joint reading of several rights guaranteed under the ACHPR including (but not limited to) the rights to life, dignity, liberty, work, health, food, protection of the family and the right to the protection of the aged and the disabled.'³⁰³

Furthermore, the African Commission defined the minimum content of this implied right to states in that they should:

Ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education consistent with human life, security and dignity.³⁰⁴

Besides, the Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and People's Rights (hereafter 'the African Court Protocol'),³⁰⁵ established the African Court on Human and People's Rights (hereafter 'the African Court') that came into force on 25 January 2004. South Africa is a party to this Protocol.³⁰⁶ In

²⁹⁹ Part II (arts 30-59) of the Banjul Charter.

³⁰⁰ Du Plessis and Maluwa (n 291) 822.

³⁰¹ See the African Commission's Resolution on the Human Rights Situation in Darfur, Sudan, adopted at its 37th Ordinary Session of 27 April to 11 May 2005.

³⁰² Ssenyonjo (n 294) 360.

³⁰³ African Commission, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (2010) at para 81.

³⁰⁴ Ibid para 82(i).

³⁰⁵ OAU Doc CAB/LRG/AFCHPR/PROT(III). Adopted on 10 July 1998.

³⁰⁶ Dugard and Dugard (n 224) 495. Ratified by South Africa on 3 July 2002.

terms of article 2 of the African Court Protocol, *it* (i.e the African Court) complements the protective mandate of the African Commission.³⁰⁷

The African Court is competent to decide 'all cases and disputes submitted to it concerning the interpretation and application of the Banjul Charter, the African Court Protocol and any other relevant human rights instrument ratified by the states concerned.'³⁰⁸

Whereas the African Commission has held on a few occasions that it considers its decisions to be the authoritative interpretation of the Banjul Charter, and therefore binding on states, the extent to which the recommendations are legally binding depends greatly on the benevolence of states.³⁰⁹

Tshoose observed that scholars view the ACHPR provisions on economic, social, and cultural rights as "A significant letdown from the promise of the preamble".³¹⁰ Notwithstanding, the formulation of these economic, social, and cultural rights bears great significance for their realisation. The ACHPR recognises the obligation of immediate realisation. This has implications for the methodology or procedures that the African Commission may deploy in implementing or realising these rights.³¹¹ The layout adopted by the Banjul Charter enables the Commission to adopt a violations approach to implementing these rights in a way that would have been unavailable to it, had the Charter resorted to the philosophy of "progressive realisation" found in the ICESCR.³¹² When all is said and done, the inclusion of social security in several international and regional human rights instruments as well as national legislation is a remarkable acknowledgement of the fact that social security is indeed a human need.

³⁰⁷ Du Plessis and Maluwa (n 291) 826.

³⁰⁸ Art 3 of the African Court Protocol.

³⁰⁹ Du Plessis and Maluwa (n 291) 825.

³¹⁰ Tshoose (n 222) 254. See also Chidi Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights Under the African Charter on Human and People's Rights' (2001) 23 *Human Rights Quarterly*.

³¹¹ Tshoose (n 222) 255.

³¹² *Ibid*.

3.3.2 Southern African Development Community (SADC)

At this junction, therefore, a brief overview of the Southern African Development Community (SADC),³¹³ of which both South Africa and Namibia are a part is apposite. The general aim of the SADC is to achieve regional integration and eradicate Poverty within the Southern African region. To achieve these goals, Member States need to work together harmoniously in achieving effective results on common problems and issues. To enable this kind of relationship, several legal and institutional instruments have been put into place to guide and standardise the work of SADC with the Member States.³¹⁴

In this regard, the Code on Social Security in the SADC is noteworthy. The Code echoes article 9 of the ICESCR. Pointedly, article 1(2) of the Code defines social assistance as follows:

This is 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.

Stwayi quoting Nyenti and Mpedi observes that the code is a non-binding instrument and simply gives guidelines on the implementation of social security.³¹⁵ Notwithstanding, it (the Code) states unambiguously under article 5(1) that people with 'insufficient means of subsistence to support themselves and their dependents should be entitled to social assistance'.³¹⁶ In addition, article 5(2) says that '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

³¹³ SADC is an inter-governmental organisation whose goal is to promote sustainable and equitable economic growth and socio-economic development through efficient productive systems, deeper co-operation and integration, good governance and durable peace and security among fifteen Southern African Member States.

³¹⁴ SADC < www.sadc.int/about-sadc/overview/sa-protocols/> accessed 11 March 2022.

³¹⁵ Stwayi (n 235) 36.

³¹⁶ Art 5(1) of the Code provides that, 'Everyone in SADC who has insufficient means of subsistence to support themselves and their dependants should be entitled to social assistance, in accordance with the level of socio-economic development of the particular Member State.'

society organisations, non-state actors, and other non-governmental organisations to establish and maintain such services.'

3.4 Summary

In conclusion, international law provides for social assistance for all. The Constitution as well provides for it. Importantly, the Constitution mandates our courts to consider international law when interpreting section 27(1)(c) of the Constitution; in terms of section 39(1)(b). Moreover, section 233 obliges courts to apply a reasonable interpretation of the SAA, that is aligned with international law, over any other interpretation that is inimical international law. As such international and regional law occupy an important role, in reinforcing the obligations of our Constitution in terms of section 27(2) thereof.

CHAPTER 4

COMPARATIVE SOCIAL ASSISTANCE LAW- THE 'BIG' DISCOURSE

Contents

4.1 Introduction	64
4.2 Basic Income Grant in South Africa- twenty years on	66
4.3 The Namibian Basic Income Grant in context.....	71
4.3.1 The Namibian BIG pilot project	72
4.4 COVID-19 Social Relief of Distress Grant in South Africa: <i>It is about time</i>	76
4.5 Summary	77

4.1 Introduction

Contemporary social protection policy colloquy has focused on the Basic Income Grant ('BIG') both as a concept and a measure to alleviate vulnerability. The BIG has gained tremendous attention worldwide as a potential policy option in social protection as evidenced by recent public debates, pilot projects, policy interventions during the coronavirus pandemic (hereafter 'COVID-19'), and an avalanche of academic research.³¹⁷ Van Parijs,³¹⁸ a proponent and vehement defender of basic income support, defines basic income as, 'an income paid by a political community to all its members on an individual basis, without means test or work requirement.' Mathebula,³¹⁹ further expounds quoting Offe, Van Parijs, and Wright that a BIG is regular cash transfers paid to all members of society irrespective of their socio-economic status, capacity, or willingness to participate in the labour market or having to meet pre-determined conditions.

But what is the 'BIG' debate like in the global South? asks Fouksman.³²⁰ This very query centres on the discussion in this chapter. Intriguing, the year 2002 is worthwhile in the discourse over a basic income in Southern Africa. This year is characterised by significant activism and interest in the BIG in this region. The current chapter thus employs a comparative legal analysis of two Southern African states: South Africa and Namibia.

According to Lollini and Palermo, there is no modern constitution-building nor constitution-making without the massive use of comparative (and international) law.³²¹ Comparative legal research demonstrates that the

³¹⁷ Brian Mathebula, 'Case Study P: Political Economy of the Basic Income Grant in South Africa' in Esther Schüring and Markus Loewe (eds), *Handbook on Social Protection Systems* (Edward Elgar Publishing Inc 2021). See also Vishwas Satgar, 'The South African Precariat, COVID-19 and #BIGNOW' (2020) 11 *Global Labour Journal* 173, where he asserts that there are presently 95 countries globally that have vibrant campaigns for BIG.

³¹⁸ Philippe Van Parijs, 'Basic Income: A Simple and Powerful Idea for the Twenty-First Century' (2004) 32 *Politics & Society* 8. See Van Parijs for an extensive discussion of the concept of basic income.

³¹⁹ Mathebula (n 317 above).

³²⁰ Elizaveta Fouksman, 'Jobs or Income Guarantees? The Politics of a Universal Basic Income and Cash Transfers in Southern Africa' in Peter Sloman, Daniel Vargas and Pedro Pinto (eds), *Universal Basic Income in Historical Perspective* (Palgrave Macmillan 2021) 225.

³²¹ Andrea Lollini and Francesco Palermo, 'Comparative Law and the 'Proceduralization' of Constitution Building Processes' in Julia Raue and Patrick Sutter (eds), *Facets and Practices of State-Building* (Brill 2009) 302.

goals of law can be achieved by the different rules and institutions in different social contexts.³²² Comparative social security law is a pivotal instrument of policy research. As Tshoose,³²³ puts it, the comparative study of the social security and policy debates of different countries is now central to policy research and teaching. He goes further and concisely postulates the tripartite importance of comparative social security studies, as follows:

[F]irstly, it intends to give an overview and introduction to comparative methods and the strengths and weaknesses of comparative analysis. Secondly, it explores variations between social security systems of different countries and assesses the extent to which they are the result of internal policy-making or external dynamics. Thirdly, research projects based on international comparative analysis aim to evaluate the effectiveness of specific policy interventions across a range of countries.

Given the foregoing, this chapter compares two countries namely, South Africa and Namibia on the provision of basic income support. First, both countries have historical, geopolitical, economic, and legal ties among other commonalities.³²⁴ Imperatively, deep-rooted poverty, inequality, and unemployment form the three grant challenges that characterise the socio-economic landscape in both countries.³²⁵ Second, both are two of the few nations in Southern Africa to provide comprehensive non-contributory social protection to children, the elderly, and the disabled.³²⁶ Finally, having launched the first-ever basic income grant trials,³²⁷ Namibia is an apposite comparator to South Africa's stagnant BIG policy.

In the main, the respective countries' approaches to the discourse of a BIG are examined. As such, the bulk of the discussion in this chapter is drawn

³²² John Bell, 'Legal Research and Comparative Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2013) 158.

³²³ Clarence Tshoose, *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life for the Poor People in South Africa* (LLD thesis, University of South Africa 2016) 226.

³²⁴ See generally the account of Stephen Devereux, 'Social Pensions in South Africa and Namibia' (2001) *IDS Discussion Paper* 379 1.

³²⁵ Klaus Schade, Justina La and Alexander Pick, 'Financing Social Protection in Namibia' (2019) *OECD Development Policy Papers* April 2019 no 19, 3 <www.oecd.org/countries/namibia/SPSR_Namibia.pdf> accessed 29 March 2022.

³²⁶ *Ibid.*

³²⁷ Claudia Haarmann and Dirk Haarmann, 'Namibia: Seeing the Sun Rise- The Realities and Hopes of a Basic Income Grany Pilot Project' in Matthew Murray and Carole Pateman (eds), *Basic Income Worldwide: Horizons of Reform* (Palgrave Macmillan 2012) 34.

on the one hand, from the findings and recommendations of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (hereafter 'the Taylor Committee'). On the other hand, from Namibia's BIG pilot project. Valuable insights into the merits, challenges, and lessons of a basic income in South Africa can thus be garnered.³²⁸ The objective of this chapter is therefore to present evidence of the social and economic impacts of the BIG, that actuate the need and feasibility of implementing a BIG for South Africa. Further impact evidence based on the quasi-BIG (i.e., the COVID-19 social relief of distress grant) launched in South Africa is presented. This chapter argues that the South African government should promptly introduce the BIG for persons aged 18 to 59 years who are unable to support themselves and their dependants. This entails a progressive phasing-in approach.

4.2 Basic Income Grant in South Africa- twenty years on

Twenty (20) years ago, the Taylor Committee presented its consolidated report, the Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (hereafter 'the Taylor Committee Report') titled *Transforming the Present-Protecting the Future*.³²⁹ Cabinet appointed notable individuals crosscutting the socio-economic arena in South Africa to the Committee chaired by Professor Vivienne Taylor. In addition, national and international socio-economic rights experts (including academics, research institutions, and non-governmental organisations) made tremendous research and other contributions, culminating in the Taylor Report.³³⁰

³²⁸ Claudia Haarmann, Dirk Haarmann and Nicoli Nattrass, 'The Namibian Basic Income Grant Pilot' in Malcolm Torry (ed), *The Palgrave International Handbook on Basic Income* (Palgrave Macmillan 2019) 358.

³²⁹ Commissions of inquiry have historically formed important fora for the development of policy, culminating in the formation of different systems of non-contributory social assistance. This account is given in Ch two of this study. To reiterate at this juncture; pursuant to the 1926 Pienaar Commission, the Old Age Pension Act of 1928 was passed and it established for the first time a right to old age pension. Devereux (n 324) 1, points out that, this was the first-ever social pension in Africa, and perhaps also the first application of means-testing. This racially biased social welfare was remedied in 1943 by the Social Security Commission, to extend coverage to groups previously excluded under the Old Age Pension Act. Consequently, the Old Age Pension Act was amended. Notwithstanding, there was never any policy development to provide for the indigent youth.

³³⁰ Taylor Committee Report v-viii.

In terms of its broad Terms of Reference, the Taylor Committee was tasked to, *inter alia*, evaluate the whole social assistance system including all grants, their funding mechanisms, and the efficiency with which they achieve their goals.³³¹ Of peculiar bearing to this study, the Committee was mandated to investigate the feasibility of a BIG.³³² The Taylor Committee construes a basic income grant as an entitlement provided without a means test that will more readily reach the poorest population. Importantly, the Committee recognises that the BIG is targeted at persons who do not receive any social assistance. In other words, those who fall through the social safety net.³³³ Following analyses, the Taylor Committee found that the BIG has an overwhelming 'potential, more than any other social protection mechanism to alleviate poverty and promote human development and sustainable livelihoods.'³³⁴

Liebenberg argues that the report's underlying philosophy is that social security reform should form part of a comprehensive social protection package.³³⁵ Collectively, the argument goes, this package of developmental strategies and programmes should be designed to ensure at least a minimum acceptable living standard for all citizens.³³⁶ These are the core minimum rights that the Constitution promises regarding socio-economic rights.³³⁷ Accordingly, the state's failure to provide at least a minimum of the right to social assistance for the 'ineligible' poorest of the poor renders their human dignity, equality, and freedom a hollow ring.

Worryingly, in the year 2000 only an estimated 3.5 million South Africans received some form of a social grant, despite 12 million of the poorest living in households that received no social assistance.³³⁸ These latter households

³³¹ Terms of Reference, 2000, para 2.2.2. See also the Taylor Committee Report Ch 1, 10.

³³² Taylor Committee Report ch 5.

³³³ Ibid 61.

³³⁴ Ibid 62.

³³⁵ Sandra Liebenberg, 'Universal Access to Social Security: Can a Basic Income Grant Meet the Challenge?' (2002) 3 *ESR Review* 8 <https://hdl.handle.net/10520/AJA1684260X_4> accessed 14 March 2022.

³³⁶ Ibid.

³³⁷ On the concept of minimum core obligations see ch 3 above.

³³⁸ Daniel McCarthy, 'A 'Basic Income Grant' as South Africa's Social Security Crisis' (2015) *DNA Economics* <www.dnaeconomics.com/pages/public_finance/?zDispID=NewsArtA_Basic_Income_Grant_as_the_solution_to_South_Africas_social_security_cri> accessed 15 March 2022.

account for those individuals who are ineligible,³³⁹ and hence, fall outside the social assistance safety net. South Africa faces unsuccessful efforts to ensure the right to social assistance for those members of the society who are poor and are excluded from the safety net.³⁴⁰ This exclusion is at variance with the objects of section 27(1)(c) of the Constitution.³⁴¹

It cannot be gainsaid that, poverty, inequality, and unemployment are weighty issues that have plagued the country since democratisation. And the youth suffer the brunt of these factors.³⁴² These factors have remained alarmingly high and will continue to be so in the near future if radical interventions are not put in place. In this respect, the ultimate ideal solution is the implementation of a BIG, targeting individuals falling through the safety net.

The Taylor Report unearthed significant findings bearing heavily on the right to social assistance for this poor and marginalised group of individuals. This study does not intend to regurgitate these findings, as they are discussed elsewhere. Bear in mind that these discoveries were reported over two decades ago. Some of the germane findings were:³⁴³

- (i) Income distribution in South Africa is highly unequal.
- (ii) High unemployment, including the massive net loss of formal sector jobs, and the growing shift towards peripheral, insecure work, is exacerbating the poverty situation.
- (iii) The impact of the HIV/Aids epidemic will exacerbate poverty and inequality.
- (iv) The patchwork of social grants inherited from the apartheid era is inadequate to meet the challenge of stamping out extreme poverty, and there are huge gaps in the system. Poor children over the age of 7 essentially have no access to social assistance (those under 7 qualify for a child support grant), nor do poor adults under the age of 60/65 (after

³³⁹ See ch 3 of this study for an overview of the legislative framework regulating eligibility for social grants.

³⁴⁰ Beth Goldblatt and Solange Rosa, 'Social Security Rights' in Malcolm Langford *et al* (eds), *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press 2014) 254.

³⁴¹ S 27(1)(C) of the Constitution guarantees everyone the right to access appropriate social assistance where they are unable to support themselves and their dependants.

³⁴² David Lam, Murray Leibbrandt and Cecil Mlatsheni, 'Education and Youth Unemployment in South Africa' in Ravi Kanbur and Jan Svejnar (eds), *Labor Markets and Economic Development* (Routledge 2009) 120.

³⁴³ Liebenberg, 'Universal Access to Social Security Rights' (n 335) 8-9.

which they qualify for a grant for the aged). Currently, about 60% of the poor, or 11 million people, are not covered by the social security system.

- (v) From a comprehensive social protection framework, 'the existing programme of social assistance grants is considerably high cost relative to its level of social effectiveness.'

Noteworthy, the Committee concluded that the current social security programmes fail to satisfy the constitutional imperatives and thus make the state vulnerable to Constitutional Court challenges and are inadequate. Since the Taylor Report, some critical reforms have since been archived. For instance, poor children between the ages of 0 and 18 years receive the Child Support Grant. Poor elderly men and women over the age of 60 receive the Old Age Grant. Concerning, the Old Age Grant, the age differentiation between elderly men and women that was previously applied was abolished.

Notwithstanding, the country is still overwhelmed by many societal deficiencies. First, income distribution remains highly unequal. Modern-day discourse should thus focus on the unsustainable inequality that plagues our country because inequality is the chief inhibitor of actual economic growth and progress towards a more stable and cohesive society.³⁴⁴ Second, unemployment currently stands at its highest in over ten years. Finally, the apartheid-inherited patchwork of access to social assistance still pervades the system and a huge gap persists. On social assistance, the policy framework that the government has favoured since democracy is arguably not the most effective.

There is ample expert evidence supporting the feasibility and resilience of a basic income support in South Africa. Added to the nuanced findings and recommendation of the Taylor Committee on a BIG for South Africa, the BIG was recently reaffirmed by a Panel of Experts on Basic Income Support (the 'Panel of Experts'³⁴⁵) commissioned by the Department of Social Development (the 'DSD') together with the International Labour Organisation ('ILO') and the United Nations Sustainable Development Goals Fund ('UNSDGF') in 2021. The goal of the social assistance system is the

³⁴⁴ Jeremy Seekings and Heidi Matisonn, 'South Africa: The Continuing Politics of Basic Income' in Matthew Murray and Carole Pateman (eds), *Basic Income Worldwide: Horizons of Reform* (Palgrave Macmillan 2012) 128.

³⁴⁵ The Panel of Experts is made up of seven experts from various research institutions across South Africa and internationally, chaired by Prof Alexandra van den Heever, including, Prof Margaret Chitiga-Mabugu, Prof Stephen Devereux, Prof Murray Leibbrandt, Prof Michael Sachs, Prof Jan van Heerden and Prof Gemma Wright.

eradication of income poverty, which should be progressively achieved over time. Likewise, the Panel of Experts sought to examine the salience and feasibility of Basic Income Support for working-age individuals between the ages of 18 and 60, in South Africa.³⁴⁶

The panel found that, notwithstanding the novel coronavirus worsening the classic issues of unequal distribution of income and joblessness, research indicates that these major challenges are endemic and by nature long-term. What is more, these challenges have not responded to government interventions implemented to date.³⁴⁷ The DSD reveals that it is precisely within this context that the Panel of Experts studied the appropriateness and feasibility of direct income support for adults who presently fall outside the existing systems of income support.³⁴⁸ The panel accordingly recommends that 'The existing COVID-19 social relief of distress grant be institutionalised and form the platform for an expanded system of basic income support which can then be improved incrementally over time.'³⁴⁹

The report of the Panel of Experts further investigates the financing options and the effects on the economy and makes recommendations to the government on these. Van der Meerendonk,³⁵⁰ asserts that there are two basic choices for financing social protection programmes, namely contributory and non-contributory financing. The latter is the concern of this study. In this instance, this includes financing from government revenues and other sources. The South African government can subsidise social protection from their revenues. The main sources of revenue are thus, tax financing and non-tax financing from general government revenues.³⁵¹ Taking stock of the foregoing factors, the Panel of Experts is of the view that an entry-level version of a basic income support can be safely implemented using a mix of financing approaches, including limited debt

³⁴⁶ DSD 'Social Development on Launch of the Expert Panel Report Basic Income Debate' (2021) < www.gov.za/speeches/social-development-launch-expert-panel-report-basic-income-support-debate-13-dec-2021-0000> accessed 15 March 2022. See also AllAfrica 'South Africa: Social Development on the Launch of the Expert Report Basic Income Debate' (2021) <<https://allafrica.com/stories/202112140139.html>> accessed 01 April 2022.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Arthur van de Meerendonk, 'Financing' in Esther Schüring and Markus Loewe (eds), *Handbook on Social Protection Systems* (Edward Elgar Publishing 2021) 137.

³⁵¹ Ibid 142.

financing, tax revenue improvements arising from any demand stimulus, and carefully calibrated tax increases where required.³⁵²

The BIG concept, along with its pros and cons not only found its way into South African policy debates from the early 2000s. As the preceding discussion reveals, the Taylor Committee found for and recommended a BIG for all South Africans, recouped and funded on progressive taxation.³⁵³ But also, during the same years, this policy discourse found its way into the Namibian socio-economic landscape, culminating in the launch of a BIG pilot project between January 2008 and December 2009. It is this pilot project that the following paragraph proceeds to investigate.

4.3 The Namibian Basic Income Grant in context

BIG in Namibia has been under scientific monitoring ever since the start of the famous BIG pilot project in 2008. According to the World Bank, Namibia has made significant strides in economic and social progress, especially when it comes to social spending.³⁵⁴ Namibia's social assistance programmes consist mainly of cash or in-kind transfers and non-contributory pensions that target households with children in poverty, the elderly, and people with disabilities.³⁵⁵ Notwithstanding, Schade, La, and Pick,³⁵⁶ note that this Republic is confronted with challenges in creating a coherent social protection system. These challenges include an absence of programmes for working-age individuals.³⁵⁷

Article 95 of the Constitution of the Republic of Namibia titled 'Promotion of the Welfare of the People' obliges the state to promote and maintain the welfare of the people of Namibia by inter alia:

... enactment of legislation to ensure that the unemployed, the incapacitated, the indigent and the disadvantaged are accorded such social benefits and

³⁵² DSD 'Social Development on Launch of the Expert Panel Report Basic Income Debate' (2021) < www.gov.za/speeches/social-development-launch-expert-panel-report-basic-income-support-debate-13-dec-2021-0000 > accessed 01 April 2022.

³⁵³ Fouksman (n 320) 231.

³⁵⁴ Herbett Jauch, 'The Rise and Fall of the Basic Income Grant Campaign: Lessons from Namibia' (2015) 6 *Global Labour Journal* 338. The World Bank notes that the country is in the top ten globally in terms of percentage of GDP spent on education and ranks second only to South Africa on the continent when it comes to expenditure on health.

³⁵⁵ Schade, La and Pick (n 325) 15.

³⁵⁶ *Ibid* 13.

³⁵⁷ *Ibid*.

amenities as are determined by Parliament to be just and affordable with due regard to the resources of the State;³⁵⁸ ...

The proposals for a BIG squarely fit into this constitutional injunction. As such, the Namibian BIG Coalition was hopeful that it could convince and encourage the government to implement the grant. The focus of the BIG Coalition's strategy was to engage policymakers and to convince them that a BIG was both an efficient and an affordable tool to fight poverty. It (i.e., the BIG Coalition) argued that the BIG was a basic economic right in line with the welfare provision of the Namibian Constitution. Consequently, a great deal of energy was put into promoting the concept and practice of a BIG.³⁵⁹

4.3.1 The Namibian BIG pilot project

The idea of a BIG was catapulted onto the national stage due to an overhaul of the Namibian tax system by the Namibian Tax Consortium (hereafter 'NAMTAX') to review the whole tax system.³⁶⁰ NAMTAX found that, firstly, Namibia is characterised by extreme disparities in income, as shown by the highest measured Gini coefficient in the world.³⁶¹ Secondly, Namibia has a profoundly severe problem of poverty.³⁶² Accordingly, NAMTAX recommended as by far the best method of addressing poverty and inequality would be a universal income grant for individuals under sixty (60) years old, which became known as the BIG.³⁶³ This BIG was to be funded mainly by progressive income taxation and an increase in value-added tax.³⁶⁴ The proposed BIG was essentially seen as an effective instrument to fight poverty, introduce an economic right and provide dignity.³⁶⁵

³⁵⁸ Art 95(g) of the Namibian Constitution.

³⁵⁹ Haarmann, Haarmann and Natrass (n 328) 357.

³⁶⁰ Claudia Haarmann and Dirk Haarmann, 'Piloting Basic Income in Namibia: Critical Reflections on the Process and Possible Lessons' (2012) <<https://basicincome.org/bien/pdf/munich2012/haarmann.pdf>> accessed 24 March 2022. The government of Namibia appointed this commission in 2001, about 10 years after obtaining independence from South Africa.

³⁶¹ Schade, La and Pick (n 325) 13, found that in 2015/16 Namibia recorded a Gini coefficient of 0.57.

³⁶² Haarmann and Haarmann, 'Piloting Basic Income in Namibia' (n 360); Schade, La and Pick (n 325) 13.

³⁶³ Haarmann, Haarmann and Natrass (n 328) 359.

³⁶⁴ Ibid. See also Fouksman (n 320) 231.

³⁶⁵ Jauch (n 354) 340.

Notwithstanding, the government was silent on the BIG recommendation, and sadly the BIG did not make sufficient inroads in government debates.

It was only in 2004 when the Basic Income Grant Coalition (hereafter 'the BIG Coalition')³⁶⁶ was formed that the Namibian government resuscitated its meagre interest in a BIG for the people of Namibia.³⁶⁷ The BIG Coalition was established out of the NAMTAX report and was spearheaded by the Evangelical Lutheran Church in the Republic of Namibia.³⁶⁸ Interestingly, in 2006 a delegation of the BIG Coalition attended the Basic Income European Network ('BIEN') Congress in Cape Town, South Africa. It became the turning point of the Namibian BIG campaign when the delegation realised that researchers in other countries, had discussed a BIG already for decades without it ever being implemented.³⁶⁹ It was there that the BIG Coalition decided to shift from mere words to action. Despite cynicism, the idea of a basic income grant pilot project was accordingly birthed.

The BIG Coalition implemented a small-scale BIG pilot project in the Namibian village of Otjivero to practically demonstrate the effects of a BIG.³⁷⁰ Haarmann, Haarmann, and Natrass,³⁷¹ argue that Namibia is an ideal nation to have been the driving force behind the first-ever case for redistribution by way of a basic income grant globally, owing to several factors. Primarily, the argument goes, it was a mineral-rich middle-income country with a relatively small population and enjoying the economic growth dividends of a long commodity boom. In the second place, this kind of redistribution was radical on account of the pervasive poverty, high unemployment, and high inequality prevalent in this country, especially in Otjivero.³⁷² In addition, Haarmann and Haarmann posit that,

³⁶⁶ This BIG Coalition composed of six civil society umbrella organisations namely, the Council of Churches, National Union of Namibian Workers, the Namibian NGO Forum, the Namibian Network of AIDS Service Organisations, the National Youth Council and the Church Alliance for Orphans. See in this regard Haarmann and Haarmann, 'Piloting Basic Income in Namibia' (n 360) 4; Haarmann, Haarmann and Natrass (n 328) 359.

³⁶⁷ Haarmann, Haarmann and Natrass (n 328) 359.

³⁶⁸ Jauch (n 354) 340.

³⁶⁹ Haarmann and Haarmann, 'Piloting Basic Income in Namibia' (n 360) 6.

³⁷⁰ see generally, Claudia Haarmann *et al*, 'Basic Income Grant: Otjivero-10 years later' (2019) <[www.bignam.org/Publications/BIG ten years later report 2019.pdf](http://www.bignam.org/Publications/BIG_ten_years_later_report_2019.pdf)> accessed 28 March 2022.

³⁷¹ Haarmann, Haarmann and Natrass (n 328) 359.

³⁷² *Ibid.* See also Devereux (n 324).

[T]he idea of the pilot was in fact not naïve but rooted in the experience of the liberation struggle in Southern Africa, where English Medium Schools or township clinics often challenged the regime to revise otherwise ideological hardened positions.³⁷³

Interestingly, the assertion went, 'it drew on the experience with pilot projects in other countries where national programmes had been implemented when the pilots had proven their viability.'³⁷⁴

The research findings of the pilot project are well-reported by prominent social justice scholars and activists including, Claudia Haarmann, Dirk Haarmann, Herbert Jauch, Hilma Shindondola-Mote, Nicoli Nattrass, Ingrid van Niekerk, and Michael Samson.³⁷⁵ The research report presents the socio-economic results after the implementation of the BIG for 12 months. The key findings include the following:³⁷⁶

- i. Before the introduction of the BIG, Otjivero was characterised by unemployment, hunger, and poverty. Most residents had settled there because they had nowhere else to go, their lives were shaped by deprivation and they had little hope for the future.
- ii. The introduction of the BIG ignited hope and the community responded by establishing its own eighteen-member committee to mobilise the community and advise residents on how to spend the BIG money wisely. This suggests that the introduction of a BIG can effectively assist with community mobilisation.
- iii. As the BIG was only introduced in one particular location, there was a significant migration towards Otjivero. Impoverished family members moved into Otjivero, attracted by the BIG. Even if migrants themselves did not receive the grant, this points to the need to introduce the BIG as a universal national grant to avoid migration to particular regions, towns, or households.
- iv. Since the introduction of the BIG, household poverty has dropped significantly. Using the food poverty line, 76% of residents fell below this line in November 2007. This was reduced to 37% within one year of the BIG. Among households that were not affected by in-migration, the rate dropped to 16%. This shows that a national BIG would have a dramatic impact on poverty levels in Namibia.
- v. The introduction of the BIG has led to an increase in economic activity. The rate of those engaged in income-generating activities (above the age of 15) increased from 44% to 55%. Thus, the BIG enabled recipients to increase their work both for pay, profit, or family gain as well as self-employment. The grant enabled recipients to increase their productive income earned,

³⁷³ Haarmann and Haarmann, 'Piloting Basic Income in Namibia' (n 360) 5.

³⁷⁴ Ibid.

³⁷⁵ Claudia Haarmann *et al*, *Making the Difference, the BIG In Namibia* (Basic Income Grant Pilot Project Assessment Report April 2009) <www.bignam.org/Publications/BIG_Assessment_report_08b.pdf> accessed 30 March 2022.

³⁷⁶ Ibid. See also Jauch (n 354) 342-344.

particularly through starting their own small businesses, including brick-making, baking of bread, and dress-making. The BIG contributed to the creation of a local market by increasing households' buying power. This finding contradicts critics' claims that the BIG would lead to laziness and dependency.

- vi. The BIG resulted in a huge reduction in child malnutrition. Using a WHO measurement technique, the data shows that children's weight-for-age has improved significantly in just six months from 42% of underweight children in November 2007 to 17% in June 2008 and 10% in November 2008.
- vii. HIV-positive residents' access to antiretrovirals (ARVs) was hampered by poverty and a lack of transport before the BIG was introduced. The BIG enabled them to afford nutritious food and gain access to medication. This was further enhanced by the government's decision to make ARVs available in Otjivero, freeing residents from the need to travel to Gobabis, a town situated over a hundred km away.
- viii. Before the introduction of the BIG, almost half of the school-going children did not attend school regularly. Pass rates stood at about 40% and drop-out rates were high. Many parents were unable to pay the school fee. After the introduction of the BIG, more than double the number of parents paid school fees (90%) and most of the children now have school uniforms. Non-attendance due to financial reasons dropped by 42% and this rate would have been even higher without the effects of migration towards Otjivero. Drop-out rates at the school fell from almost 40% in November 2007 to 5% in June 2008 and further to almost 0% in November 2008.
- ix. The residents have been using the settlement's health clinic much more regularly since the introduction of the BIG. Residents now pay the N\$4 payment for each visit and the income of the clinic has increased fivefold from N\$250 per month to about N\$1 300.
- x. The BIG has contributed to a significant reduction in crime. Overall crime rates – as reported to the local police station – fell by 42% while stock theft fell by 43% and other theft by nearly 20%.
- xi. The introduction of the Basic Income Grant has reduced the dependency of women on men for their survival. The BIG has given women a measure of control over their sexuality, freeing them to some extent from the pressure to engage in transactional sex.³⁷⁷

At the end of the pilot project, the payment with a reduced amount in form of a bridging allowance continued.³⁷⁸ The allowance was to 'bridge' people over up-until national implementation. The bridging allowance, although to a lesser extent than the BIG, gave some form of income security up until March 2012. Since then, payments have been made sporadically due to a lack of funds. It is not certain whether and if so when the government of Namibia will consider a national introduction. In the face of COVID-19, there are undeniably more reasons to implement the BIG on a national scale.

³⁷⁷ See also Sofia Littmarck, 'Basic Income Grant Towards Poverty Alleviation in Namibia: A Discourse Analysis of Conceptions of Poverty and Poverty Alleviation within the BIG Coalition' (Master of Social and Cultural analysis thesis, University of Linköping 2010) 9-10.

³⁷⁸ Haarmann and Haarmann, 'Piloting Basic Income in Namibia' (n 360) 1.

4.4 COVID-19 Social Relief of Distress Grant in South Africa: *It is about time*

Recently, increasing attention has been given to calls for the introduction of a BIG since the coronavirus pandemic ('COVID-19') crisis in South Africa.³⁷⁹ Since the COVID-19 crisis, public debates around the merits of introducing a BIG have gained urgency, especially in the face of the anticipated expiration of the COVID-19 basic package of support.³⁸⁰ The BIG discussion re-emerged partly in recognition of the economic impact of the COVID-19 lockdown and the government's announcement of a temporary social assistance grant aimed at the 18-59 years old unemployed individuals, who are not covered by any social protection scheme. It should be made clear at this juncture that the R350 COVID-19 social relief of distress grant (hereafter 'COVID-19 SRD grant') is the first of its kind where unemployed working-age adults are being included in the social grant system, since democratisation.

On 21 April 2020, almost a month after the commencement of the nationwide lockdown,³⁸¹ the government announced a R500 billion fiscal stimulus package. This was the most important economic intervention in response to COVID-19.³⁸² These interventions included in particular the instalment of a new monthly COVID-19 SRD grant of R350, introduced for people who are unemployed and not receiving any other grant or support from the Unemployment Insurance Fund.³⁸³ Citizens, permanent residents, refugees, asylum-seekers, and special permit holders are all eligible for this grant.³⁸⁴ The R50 million set aside for this special grant was initially to be

³⁷⁹ Ihsaan Bassier *et al*, 'Locked Down and Locked Out: Repurposing Social Assistance as Emergency Relief to Informal Workers' (2021) 139 *World Development* 5 fn 7.

³⁸⁰ *Ibid*.

³⁸¹ Satgar (n 317) 173, describes the South African lockdown as one of the most stringent in the world.

³⁸² Haroon Bhorat, Morne Oosthuizen and Ben Stanwix, 'Social Assistance Amidst the COVID-19 Epidemic in South Africa: A Policy Assessment' (2021) 89 *South African Journal of Economics* 65.

³⁸³ Bassier *et al* (n 379) 5. Other measures were (a) an increase to the Child Support Grant of R300 for one month, followed by an increase of R500 per month from June to October (but limited during the latter period to one increase per caregiver); and (b) an increase to all other social grants (such as the Old Age Pension and the Disability Grant) of R250 per month until October.

³⁸⁴ Karabo Ngoepe and Mzilikazi Wa Afrika, 'SASSA to Spend R700m Providing Refugees with the R350 Covid-19 relief grant' (2020) *IOL* <www.iol.co.za/sundayindependent/news/sassa-to-spend-r700m-providing-refugees-with-the-r350-covid-19-relief-grant-49703342> accessed 30 March 2022.

provided for six months.³⁸⁵ Nevertheless, various extensions have been announced, with the latest ending in March 2023.

The financial relief package 'put aside' by the government included the broader availability of the SRD grant to anyone who has no income, including discouraged work-seekers and the long-term unemployed, typically excluded from the government's ordinary social protection policy.³⁸⁶ The underlying idea of the COVID-SRD income support is generally to supplement, the low levels of household income earned by the majority of South Africans from informal employment and crucially, to provide for those who have no means of income whatsoever. These economically vulnerable individuals have been negatively impacted by the lockdown and COVID-19-related shocks.³⁸⁷

The COVID-19 SRD grant was significantly determined by what was understood to be a feasible targeting system. This determination sought persons not being *in* formal employment (so no individual payroll tax nor contributory social insurance record), nor being registered in the existing social grant registry. Gelb and Mukherjee,³⁸⁸ describe these individuals as the 'missing middle'. Because of their 'missing,' status, the DSD generated new beneficiary lists as not much information is available to determine who is deserving. The COVID-19 SRD grant was thus ultimately envisaged as a BIG with easily implementable exclusion restrictions linked to existing administrative registries, similarly to other countries which have introduced novel interventions.³⁸⁹

4.5 Summary

Critics of the BIG are surprisingly misinformed as they seem not to have engaged and acquainted themselves neither with the basic concept nor the

³⁸⁵ May to October 2020.

³⁸⁶ Gary Pienaar *et al*, 'The Big Question: COVID-19 and Policy Support for a Basic Income Grant' (2021) *HSRC Policy Brief* <www.hsrc.ac.za/uploads/pageContent/1045500/HSRC%20Policy%20Brief%209%20-%20The%20BIG%20Question_print-ready_19-3-2021.pdf> accessed 29 March 2022.

³⁸⁷ Borhat, Oosthuizen and Stanwix (n 382) above.

³⁸⁸ Alan Gelb and Anit Mukherjee, 'Digital Technology in Social Assistance Transfers for COVID-19 Relief: Lessons from Selected Cases' (2020) *Centre for Global Development* policy paper 181, 7-8, 16 <www.ictworks.org/wp-content/uploads/2020/09/lessons-learned-digital-technology-social-assistance-programs.pdf> accessed 29 March 2022.

³⁸⁹ *Ibid*.

research results and economic calculations. There is vast evidence that indeed a BIG can and will significantly curb the three major challenges of poverty, inequality, and joblessness, with which many of the youth and adults between the ages of 18 and 59 in South Africa are faced. Extensive evidence points to the great support for this income support. Nevertheless, political will is the main barrier to realising the BIG in both South Africa and Namibia. Even so, it is commendable that the BIG Coalition of Namibia made considerable strides toward universal income support for the poor. Given, on the one hand, the wide-ranging socio-economic impact that the pilot project has had on the people of Otjivero, and on the other, the fiscal viability of a BIG, time is now (more than ever before) ripe for the government of South Africa to progressively implement the BIG.

People aged 18 to 59 years old should thus be at the forefront of this progression. Also, the rollout of the COVID-19 SRD grant is not only a laudable economic intervention to mitigate the socio-economic difficulties occasioned by COVID-19, but also illustrates the urgency with which the BIG basic is needed for the poor and marginalised. This will embrace the spirit enshrined in section 27(1)(c) of the Constitution, 'to provide those who cannot support themselves and their dependants', while also obviating the short and long-term catastrophic consequences of COVID-19. *It is about time!*

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

Contents

5.1 Introduction	80
5.2 Conclusion.....	80
5.3 Recommendations	88
5.3.1 Financing and sustainability of the BIG	89
5.3.2 Impact of the BIG on poverty reduction.....	90
5.3.3 Impact of a BIG on economic transformation	91

5.1 Introduction

This chapter is the last of the five chapters of this study. It provides concluding remarks to the analyses presented in the preceding chapters. Furthermore, it gives recommendations on the need and viability of the basic income grant in South Africa. Principally, the chapter concludes that the basic income grant is grounded on the right to social assistance. The basic income grant is the keystone of a comprehensive social security system for South Africa. The chapter thus argues that a basic income grant is a useful tool that would help solve the problem of facilitating social security for all those who need it, as envisaged in the Constitution of the Republic of South Africa, 1996.

5.2 Conclusion

This mini-dissertation set out to analyse the legal viability of the Basic Income Grant ('BIG') in South Africa. The recommendations passed over two decades ago by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa ('the Taylor Committee') in this regard are highly significant. The extraordinary recommendation of the Taylor Committee was the implementation of a basic income grant for all in South Africa. This is in line with the broader ideal of comprehensively transforming the social security system in the country. While also keeping with the constitutional injunction of realising the right to appropriate social assistance assured everyone under section 27(1)(c).³⁹⁰ The vigorous investigations and the resultant recommendations of the Taylor Committee are lauded.

Given the foregoing, the study commenced in chapter one (1) with a concise contextual assessment of the triad issues of poverty, inequality and unemployment in the country. It found the trio to be the most troubling problems to have antagonised the democratic administration. The brunt of these issues is mostly felt by the poorest of the poor. Able-bodied people aged 18 to 59 years are particularly vulnerable as they are deprived of social income protection by enabling legislation, appropriate to sustaining a livelihood. This is despite the constitutional entrenchment of everyone's right to access appropriate social assistance in terms of section 27(1)(c). The mini dissertation found that the provision of social assistance, in the

³⁹⁰ S 27(1)(c) of the Constitution of the Republic of South Africa, 1996 ('the Constitution').

form of social grant transfers is the chief strut through which the state seeks to obviate vulnerability from these problems, but for a limited group of people. Principally, investing in social protection policies and programs improves resilience, equity and opportunity for individuals and societies while mitigating poverty. The study employed a desktop qualitative methodology thus, pertinent legislation, case law, scholarly publications and international instruments were studied to understand how these mishaps are or ought to be addressed. Curiously, how was the social welfare dispensation pre-democracy?

Chapter two (2) proceeded to examine social assistance before constitutionalism, to learn how the *right* and system came to be, thus addressing the question posed immediately above. The object was to examine which social welfare measures were put in place then and how those measures impacted people, especially those aged between 18 and 59 years old. In this regard, the study identified three epochs. These were the pre-colonial, the colonial and the apartheid periods. In this endeavour, it found that indigenous South Africans had established social welfare systems that provided communal social welfare security.³⁹¹ These measures were all-embracing and generally provided security for all members of society.³⁹² Uttered differently, the means-testing approach was not a determinant for social assistance support. These indigenous social security measures were profound and outside governmental interference. The colonial administration upon arrival distorted those systems and imposed their outlooks on social welfare security for the majority of South Africans; being predominantly black.³⁹³

During the apartheid era, the apartheid administration sought to segregate people on a wide variety of grounds, including race.³⁹⁴ Unsurprising, therefore, blacks were not thought of as deserving of the state's welfare support. Poverty was viewed as a 'white' problem, thus only people of

³⁹¹ Clarence Tshoose, 'Social Assistance: Legal Reform to Improve Coverage and Quality of Life for the Poor People in South Africa' (LLD thesis, University of South Africa 2016) 43-47.

³⁹² Megan Govender, 'Conditional Cash Transfer as a Means of Addressing Poverty in South Africa' (Doctor of Commerce thesis, University of South Africa 2011) 79-81.

³⁹³ Johannes Kruger, 'State Provision of Social Security: Some Theoretical, Comparative, and Historical Perspectives with Reference to South Africa' (Master of Commerce Thesis, University of Stellenbosch 1992) 111.

³⁹⁴ James Midgley and David Piachaud, 'Imperialism, Colonial and Social Welfare' in James Midgley and David Piachaud (eds), *Colonialism and Welfare: Social Policy and the British Imperial Legacy* (Edward Elgar 2011).

European descent were obviated from poverty through state social welfare support.³⁹⁵ Several commissions of inquiry were appointed to better understand and address this fallacious notion of 'white poverty'.³⁹⁶ Black people were, however, gradually included in those programmes. Still, with differential treatment to their 'white' counterparts. 'Blacks' received way lesser grants than 'whites'. Moreover, age was also a segregationist factor as able-bodied persons between 18 and 59 years of age did not receive any state social assistance. This group of individuals had no place within the apartheid welfare state.

This study thus concludes that indigenous social welfare systems provided for all members of society, indiscriminately, to curb vulnerability. However, the rise of both colonialism and apartheid, respectively, disarrayed those systems and imposed segregationist worldviews that cemented black people, especially working-age youth and adults into poverty, vulnerability and income insecurity.

From the preceding historical account, the study then probed the constitutional right to social assistance. First and foremost, the supreme Constitution recognises pre-democratic injustices.³⁹⁷ It unequivocally commits in its preamble, to inter alia, "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". And to "Improve the quality of life of all citizens and free the potential of each person".³⁹⁸ From this premise, the study found that the democratic administration inherited the incomprehensive and segmented social welfare system designed before constitutionalism. In assessing how the state sought to remedy this calamity, the chapter analysed how the rights enshrined in the Constitution of the Republic of South Africa, 1996 ('the Constitution') address these triad challenges. In particular, how the right of everyone to access social security, *including, appropriate social assistance* in terms of section 27(1)(c) and the institutions created by the Constitution (i.e., the judicial institutions in particular) can contribute to addressing these problems. It is argued that a

³⁹⁵ Jeremy Seekings, 'The Social Question in *Pre-Apartheid* South Africa: Race, Religion and the State' in Jeremy Seekings (ed), *One Hundred Years of Social Protection* (Palgrave Macmillan 2021) 193; Gugulethu Nkosi, 'Traditional and Contemporary Social Assistance Measures in South Africa: A Historical Perspective' (2013) 28 *Southern African Public Law* 315-316.

³⁹⁶ Seekings n 395 above.

³⁹⁷ The preamble to the Constitution.

³⁹⁸ *Ibid.*

great deal of responsibility, rests with the democratic government to reform our disarrayed social security system.

The study drew from the works of literature of prominent scholars cross-cutting the social sciences such as Tshoose,³⁹⁹ Liebenberg,⁴⁰⁰ and Patel,⁴⁰¹ among many others, who learned that the constitutional text is a liberal commitment and guarantees a myriad of constitutional rights. These rights are interdependent and cannot be understood in isolation, thus each informs the others. The Constitutional Court in *Grootboom*,⁴⁰² attests to this when it held that:

[T]he poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights.⁴⁰³

Albeit from a right to housing perspective in the main, this contention equally applies to the right to social assistance, to a considerable extent. Accordingly, the constitutional right to social assistance and the jurisprudence that emanates therefrom recognise the demise of the poor and the urgency to eliminate it.

The study argues that section 27(1)(c) is not sufficiently realised. All those entitled to social assistance, because they cannot take care of themselves or their dependents, do not have access to it.⁴⁰⁴ Based on Stwayi's argument, this rationale is primarily ideological and based on the 'we can't afford it' argument.⁴⁰⁵ As a result of its desire not to become a welfare state, the government avoids giving social assistance to individuals between 18 and 59 years of age, despite its duty to realise the right of everyone unable to provide for themselves in terms of section 27(1)(c).

³⁹⁹ Tshoose n 391 above.

⁴⁰⁰ Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Co Ltd, 2010).

⁴⁰¹ Leila Patel, *Social Welfare and Social Development* (2nd edn, OUP 2015).

⁴⁰² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (hereafter "*Grootboom*").

⁴⁰³ *Grootboom* para 36.

⁴⁰⁴ Lithalethemba Stwayi, 'The Need for a Basic Income Grant' (LLM mini-dissertation, University of Pretoria 2018) 80.

⁴⁰⁵ *Ibid*.

Subsection 2 of section 27 states that the state is required to fulfil the right to social assistance in line with three familiar directives. First by 'taking legislative and other measures', second, 'within its available resources', and third, 'progressively'. The concept of progressive realisation was borrowed from article 2 of the International Covenant on Economic, Social and Cultural Rights (1966) ('ICESCR'). A progressive approach to realisation has two functions, as implied by *Grootboom*. In one sense, this acts as an important constraint on how fast the state can fulfil its positive duties because it acknowledges that the full realisation of socio-economic rights cannot be achieved by immediate means. In the other sense, it imposes certain duties of conduct on the state, namely that the state must actually take legislative and other measures aimed at ensuring gradual implementation of the right to social assistance.

The right to social assistance does not enjoy sufficient jurisprudence, to demarcate what the right under section 27(1)(c) of the Constitution entails. However, the case of *Khosa*,⁴⁰⁶ stands out. This judgment is a notable Constitutional Court pronouncement on the right of everyone to access social assistance, on the issue of the exclusion of permanent residents from the purview of the South African social assistance system. The judiciary has not yet confronted the right to access appropriate social assistance as it pertains to poor and able-bodied persons.

Notwithstanding this deficit, there is blossoming jurisprudence on other socio-economic rights of the Constitutional Court as above noted. This jurisprudence is valuable in developing section 27(1)(c) right to appropriate social assistance. In *Grootboom* the Constitutional Court held that, in addition to their textual setting, the rights need to be interpreted in their social and historical context. This study concludes that the right to appropriate social assistance fits neatly within this holding. This is because the right is inextricably linked to our dreadful social and historical background.

Purporting to fulfil the constitutional injunction in terms of subsection 2, the state passed the Social Assistance Act,⁴⁰⁷ ('SAA') which provides for the various social grants and the category of persons that are entitled to receive them. The SAA uses a targeting approach to the provision of social grants.

⁴⁰⁶ *Khosa v Minister of Social Development; Makhaule v Minister of Social Development* 2004 (6) SA 505 (CC).

⁴⁰⁷ Act 13 of 2004.

Targeting is a useful tool. It is in line with the moral imperative shared by modern communities to help the neediest first or most. However, it may pose some conceptual and practical challenges with cost implications. Furthermore, it features numerous criteria and metrics by which success may be gauged. In general, the SAA targets the young (aged 0 -18), the old (aged 60 and above) and the disabled. Notwithstanding, the impact that access to social grants makes to alleviate poverty is commendable. But there are still holes in the safety net. The right to social assistance for able-bodied people aged between 18 and 59 is not realised, and for that matter violated, to the extent that the SAA does not recognise their right to social assistance to eliminate their vulnerability, social exclusion and income inequality.

Chapter 3 then examined the right to social assistance at international and regional levels. The South African Constitution is in line with law at international and regional levels, as instructed by section 39(1) of the Constitution. Global instruments such as the Universal Declaration on Human Rights of 1948 ('UDHR') and the ICESCR do not contain any direct references to the term social assistance.

Despite this, the Committee of Economic, Social, and Cultural Rights ('CESCR') note that the right to social security includes a requirement that states work toward a non-contributory safety net pursuant to article 9 of the ICESCR. In keeping with its tradition, the CESCR has also outlined the minimum core of the right to social security. Minimum core means that everyone will have access to the minimum essential level of social security. Indispensable to acquiring basic socio-economic fundamental rights such as food, water, and health care services. Similarly, social security protection must be accessible without discrimination, especially for marginalised groups. There is now (more than before) a great deal of obligations that rest on the South African government since its recent ratification of the ICESCR. The ICESCR binds South Africa, and it (i.e. the ICESCR) no longer only serves as a guide, to our socio-economic rights discourse.

Furthermore, the International Labour Organisation ('ILO') has developed a framework that seeks to take real action, as opposed to mere aspirations. Inexplicably, there is no ILO instrument describing the scope and architecture of social assistance. The paradigmatic Social Security Convention 102, of 1952 is based on an implied inclination for social insurance, because the minimum standards are linked to the various social

risks that are typically covered by social insurance schemes globally. Notwithstanding, Recommendation 202 of 2012 on National Floors of Social Protection does contain some explicit references to social assistance.

The chapter went further to look at the regional framework. It found that the right to social security, and for that matter the right to social assistance, is not specifically protected in the African Union's ('AU') African Charter on Human and Peoples' Rights ('ACHPR or the Banjul Charter'). Be that as it may, the African Commission on Human and Peoples' Rights (hereafter, 'African Commission') has held that this right can be derived from a joint reading of several rights guaranteed under the ACHPR.⁴⁰⁸ The African Commission further stresses that the right to social security imposes, amongst others, an obligation on South Africa as a state party, to ensure a minimum level of support and to adopt social assistance measures. Also, it is worthwhile to point at the jurisprudence emanating from decisions of the African Commission and the African Court of Human and Peoples' Rights (hereafter the 'African Court') concerning rights enshrined in the Banjul Charter. This jurisprudence recognises state obligations to alleviate vulnerability in a variety of situations, without actually embracing a general right to social assistance as such.

Considering the analysis set out above, the study concludes that the fundamental right to social assistance has gained normative recognition, both internationally and at the national constitutional level. However, all frameworks do not afford poor, able-bodied people sufficient basic income support.

The mini dissertation went on, in chapter four (4), to examine the surging discourse on a basic income grant (BIG) or universal basic income grant/basic income support, whichever terminology is used. The study argued that the foundation of the BIG discourse in South Africa rests in section 27(1)(c) of the Constitution. In addition, a comparative approach was adopted from the Namibian perspective. This choice was informed by the socio-economic and legal ties among other commonalities between Namibia and South Africa. In particular, the 2007-2008 first-ever BIG pilot project in Otjievero,

⁴⁰⁸ Manisuli Ssenyonjo, 'Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years Since the Adoption of the African Charter' (2011) *Netherlands Quarterly of Human Rights* 361-383.

Namibia strongly motivated this comparative selection. Evidence was drawn from the *Basic Income Grant Pilot Project Assessment Report*.⁴⁰⁹ This report consists of the research findings of the panel of experts that studied the pilot project. The research report presents the socio-economic results during and after the implementation of the BIG. The chapter found that the Namibian pilot project realised significant benefits, despite it being short-lived. Among others, there was an economic boom and a significant reduction in poverty and crime in the area.

The Coronavirus pandemic ('COVID-19') continues to wreak global havoc with its effects on the social and economic spheres.⁴¹⁰ The extent to which households have survived or sunk during this crisis has been heavily influenced by government responses. COVID-19 has highlighted the importance of social protection systems that can respond quickly to shocks, assisting the newly vulnerable as well as those already in need.⁴¹¹ Because of this, chapter four (4) further analysed the rollout of the covid-19 social relief of distress grant of R350 a month. Unfortunately, this special grant is expected to cease in March 2023.⁴¹² Generally, the poor and unemployed are eligible to apply for (and be granted) this grant. The study identified this measure as a quasi-BIG measure of social income support in South Africa. This measure espouses the goal of universal social protection.

It was found that there is a significant number of young and adult persons between 18 and 59 years who desperately rely on the grant. Further, the South African Social Security Agency ('SASSA') has a relatively good administrative capacity, despite some shortcomings. Some of these hurdles include inclusion and exclusion errors. Critically, a national rollout of basic income support will significantly curb many administrative red tapes. The rollout of the COVID-19 SRD grant is not only a laudable economic

⁴⁰⁹ Claudia Haarmann *et al*, *Making the Difference, the BIG In Namibia* (Basic Income Grant Pilot Project Assessment Report April 2009) <www.bignam.org/Publications/BIG_Assessment_report_08b.pdf> accessed 30 March 2022.

⁴¹⁰ Ihsaan Bassier *et al*, 'Locked Down and Locked Out: Repurposing Social Assistance as Emergency Relief to Informal Workers' (2021) 139 *World Development* 6-9.

⁴¹¹ Alan Gelb and Anit Mukherjee, 'Digital Technology in Social Assistance Transfers for COVID-19 Relief: Lessons from Selected Cases' (2020) *Centre for Global Development* policy paper 181, <www.ictworks.org/wp-content/uploads/2020/09/lessons-learned-digital-technology-social-assistance-programs.pdf> accessed 29 March 2022.

⁴¹² At the time of writing.

intervention in mitigating the socio-economic difficulties occasioned by COVID-19. It is also a measure that provides a stepping stone toward the national implementation of basic income support for all. Facts be faced, even after COVID-19 recedes, the vulnerabilities and inequalities it reveals and further widens will persist. Likewise, the need for social protection that is tailored to the needs of those most affected by this global catastrophe ought to be revised.

If South Africa is to make real progress in eliminating poverty and reducing income inequality, it will need to provide its people with a secure foundation from which they can expand their capabilities and improve their life opportunities.

5.3 Recommendations

The need for the introduction of the BIG in South Africa is underscored by some key statements, notably the Government's draft Ten Year Review document,⁴¹³ that to the extent necessary found:

[T]he advances made in the First Decade by far supersede the weaknesses. Yet, if all indicators were to continue along the same trajectory, especially in respect of the dynamic of economic inclusion and exclusion, we could soon reach a point where the negatives start to overwhelm the positives. This could precipitate a vicious cycle of decline in all spheres. Required are both focus and decisiveness on the part of government, the will to weigh trade-offs and make choices, as well as to proceed along a new trail.⁴¹⁴

Relatively recently the government of the Republic adopted the National Development Plan 2030 (the 'NDP'), which seeks to comprehensively steer government policy development. In short, the NDP is a plan of action which outlines the intended socio-economic developments to be achieved in South Africa by the year 2030. There continues to be a great inclination for income support for the working-age population through the public works programme. Despite the NDP's hesitancy towards a basic income grant, it does acknowledge the need for inclusive social protection in terms of outcome 13 of the NDP. Furthermore, the NDP desires that by 2030, all those 'eligible' for social assistance should have access. To this end, the

⁴¹³ Towards a Ten Year Review: Synthesis Report on Implementation of Government Programmes: Discussion Document (2003) <www.gov.za/sites/default/files/10year.pdf> accessed 14 March 2022. See also the Fifteen and Twenty-five year Reviews.

⁴¹⁴ Ibid 102.

study recommends the amendment of the SAA, so as to include deserving working-age persons.

The NDP notes that social grants are currently targeted through means-testing. Promisingly, it further notes the proposal to introduce a basic income support grant, that should ordinarily remove the means test so that each person, by merit of being a citizen, would receive benefits from social protection guarantees. There are societal benefits to this as it would accelerate delivery and make it easier to reach those who are currently eligible but who are not receiving the grants. It would cushion millions of families from the effects of household-level and economy-wide shocks. It would also reduce the administrative burden on the poor. Every element of the proposal to extend or expand guarantees would need to be financially quantified.

Considering the foregoing, the study recommends the following:

5.3.1 Financing and sustainability of the BIG

Financing a BIG is a considerable element of the feasibility of the grant. This study does not attempt to provide a detailed analysis due to its limited scope and extent. Such research has been expertly undertaken elsewhere.⁴¹⁵ Notwithstanding, financing mechanisms further play an intrinsic role in determining the sustainability of the BIG. There is no single approach to financing the BIG. Financing includes a blend of traditional and innovative mechanisms.

Firstly, the Taylor Committee found that the Constitution does not, in any way, prohibit the state from creating dedicated taxes and earmarking funding to fund social assistance.⁴¹⁶ Furthermore, it (the Committee) asserted that a difference should be struck between the *gross burden* and the *net burden* of the BIG.⁴¹⁷ Arguments were further raised that if the BIG was funded using an increased VAT rate, the net burden would be 13,5

⁴¹⁵ See Institute for Economic Justice, *Financing option for a Universal Basic Income Guarantee in South Africa* (Draft Social Security Policy Brief 2, 2021) < <https://www.iej.org.za/wp-content/uploads/2021/07/IEJ-Policy-Brief-Financing-a-UBIG.pdf>> accessed 25 April 2022; BIG Finance Reference Group, *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* (2004) < <https://static.pmg.org.za/docs/0410BIG.PDF>> accessed 30 March 2022.

⁴¹⁶ Ch 14 of the Taylor Committee Report.

⁴¹⁷ Stwayi (n 404) 58.

billion (i.e in 2002).⁴¹⁸ However, since tax increases did not fall within the ambit of the Taylor Committee's scope of investigations, the Committee only provided a generalised overview of this aspect. It however noted that "there is evidence of sufficient fiscal capacity for improved social sector spending without adverse macro-economic impacts".⁴¹⁹ It cannot be gainsaid, therefore, that direct financing from tax increases is thus the chief method through which the BIG could be funded.

The state must strive to generate sufficient income from the active groups in the population to be able to redistribute to those that are less active or inactive. Increases in spending are more likely to be justified since there is public support for the BIG and it promotes social inclusion. This is more likely where taxes are raised efficiently, and the combined package of expenditure and financing is redistributive. Appropriate tax reform associated with the BIG can achieve very effective redistribution. Critically, whichever financing mechanism(s) is adopted should be progressive.

To achieve this, the government should play a more active and grander role, including ensuring the system is adequately funded and accountability is strengthened. Since there are several pathways to ensure the financing of a BIG, its implementation now rests on the political will to immediately address the most extreme levels of poverty.

5.3.2 Impact of the BIG on poverty reduction

Poverty undermines access to fundamental socio-economic human rights, including health care, food and water. The current social assistance system has shown some effectiveness in combating poverty in South Africa. They dominate the income profile of many poor households and thus play a vital role in sustaining lives and livelihoods for households that have no employed members. But these alone are not enough to eliminate income poverty. There exists a relatively overwhelming number of working-age persons, who are without employment, thus burdening the little grants pooled within households. This cements individuals and families into a perpetual state of poverty. This concern points to the need for complementary measures and support. The BIG is the most appropriate measure to mitigate this deficiency. This will reduce overall poverty considerably.

⁴¹⁸ Taylor Committee Report at 134.

⁴¹⁹ Stwayi (n 404) 58.

5.3.3 Impact of a BIG on economic transformation

The BIG could become a springboard for economic development. The economic growth resulting from social security reform has positive fiscal effects. It raises overall national income, and thus supports the capacity of the economy to support fiscal expenditure.⁴²⁰ Research demonstrates that success in job-seeking is strongly correlated to income.⁴²¹ As income rises, people tend to look for work more vigorously and are more likely to find it. Even a small, stable income enables poor households to take the sort of risks inherent in job seeking and entrepreneurship.

Economists have a consensus on the affordability and social imperative of a BIG. Le Roux concluded that "a universal income grant is particularly appropriate to countries such as South Africa and Namibia. Indeed, it is the only feasible way in which to deal effectively with poverty and inequality in the short- to medium-term."⁴²² Also, the analysis advanced by Meth raised the question of "whether the country can afford 'not' to introduce the BIG."⁴²³ Finally, the Economic Policy Research Institute concludes that "the Basic Income Grant is feasible, affordable, and supportive of poverty reduction, economic growth and job creation."⁴²⁴ In light of this avalanche of expertly articulate findings, this study finds that the government should implement the BIG, gradually with the 18 to 59 years working-age population at the forefront of this gradual realisation. It is hoped that in the near future, a national roll-out of the BIG will be adopted.

⁴²⁰ BIG Finance Reference Group (n 415) 52.

⁴²¹ Ibid 27.

⁴²² Ibid 43.

⁴²³ Ibid.

⁴²⁴ Ibid 41.

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