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“Impact of Social Security on South Africa’s Transformative Constitutionalism Agenda”

Nyenti MAT\* and Nguluwe MS\*\*

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\* Faculty of Law, University of Johannesburg

\*\* Faculty of Law, University of Johannesburg

## Impact of Social Security on South Africa’s Transformative Constitutionalism Agenda

Nyenti MAT\* and Nguluwe MS\*\*

### ABSTRACT

At the end of apartheid, South Africa adopted a new Constitution as the supreme law of the Republic. The spirit and tenor of the Constitution is one that promised the equal protection of the laws to all the people of South Africa; and a ringing and decisive break with a past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action. The aspirations of the Constitution in establishing a new South African society has been termed ‘transformative constitutionalism’. The right of access to social security is one of the rights guaranteed by the Constitution in order to achieve its aims. The guarantee of the right of access to social security and related rights has been very instrumental in the development of the social security system. This development has had an immense impact on the transformation of South African society, thereby advancing the transformative constitutionalism agenda.

### 1. Introduction

In 1993, South Africa adopted a new Constitution as the supreme law of the Republic.<sup>1</sup> The spirit and tenor of the Constitution is one that promised the equal protection of the laws to all the people of South Africa; and a ringing and decisive break with a past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action.<sup>2</sup> The Constitution aims to (amongst others) 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.<sup>3</sup> Therefore, the Constitution was adopted and a Bill of Rights was entrenched, not only to avoid a repetition of and to redress South Africa’s past injustices, but in order to establish a new society based on mutual respect, equality and freedoms.<sup>4</sup>

The aspirations of the Constitution in establishing a new society has been termed ‘transformative constitutionalism’. The right of access to social security is one of the rights guaranteed by the Constitution in order to achieve its aims.<sup>5</sup> As the Constitutional Court has stated, this right cannot be interpreted in isolation as there is a close correlation between it and other constitutional rights and values.<sup>6</sup> The Court pointed out that the rights in the Bill of Rights are interrelated, interdependent and mutually supporting; and they must be read

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\* LLD (UNISA), LLM (UJ), LLB (Buea). Senior Lecturer: Department of Mercantile Law, Faculty of Law, University of Johannesburg. Email: [mnnyenti@uj.ac.za](mailto:mnnyenti@uj.ac.za).

\*\* LLM (NWU), LLB (Yaounde II). Researcher: Centre for International and Comparative Labour and Social Security Law (CICLASS), Faculty of Law, University of Johannesburg. Email: [marangasn@gmail.com](mailto:marangasn@gmail.com).

<sup>1</sup> Constitution of the Republic of South Africa, 1993 (Interim Constitution). See also Constitution of the Republic of South Africa, 1996 (Constitution).

<sup>2</sup> *S v Mhlungu and Others* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC).

<sup>3</sup> Preamble of the Constitution.

<sup>4</sup> MP Olivier *et al* “Constitutional issues” in MP Olivier *et al* (eds.) *Social Security: A Legal Analysis* (Durban: LexisNexis, 2003) p. 52.

<sup>5</sup> Section 27(1)(c) guarantees everyone the right to have access to social security, including appropriate social assistance for persons who are unable to support themselves and their dependants. Section 27(2) further requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access to social security.

<sup>6</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) para 24 (*Grootboom* case).

together in the setting of the Constitution as a whole, and their interconnectedness needs to be taken into account in interpreting rights. These rights, which include the rights to equality,<sup>7</sup> human dignity,<sup>8</sup> land,<sup>9</sup> adequate housing,<sup>10</sup> health care,<sup>11</sup> food and water<sup>12</sup> and just administrative action<sup>13</sup> must thus be considered in interpreting the right of access to social security.

The guarantee of the right of access to social security and related rights has been very instrumental in the transformation of the South African social security system. It has led to the adoption or amendment of various statutes aimed at realising the right.<sup>14</sup> The right has also been invoked successfully to challenge unfair and unjustifiable discriminatory practices, administrative injustices and the failure by the state to implement social security-related measures.<sup>15</sup> All of these reveal that that the right of access to social security has had an impact on the development of a social dimension to South Africa’s transformative constitutionalism agenda.

This paper evaluates the role and impact the guarantee of the right of access to social security in the Constitution has had in transforming South African society. It is divided into six parts. The first part analyses the concept of transformative constitutionalism. The second part evaluates the South African social security system before the adoption of the Constitution. The third part discusses the Constitutional framework of social security. The fourth part traces the development of the South African system since the enactment of the right of access to social security, highlighting influence on transformative constitutionalism. The final part draws some conclusions on the role or impact of the right of access to social security to transformative constitutionalism.

## **2. Concept of transformative constitutionalism**

It has been stated that there is no single accepted and stable definition for transformative constitutionalism because the word transformation by itself has changeable features.<sup>16</sup> This is also because the word ‘transformation’ is used to denote a wide range of processes or programmes, ranging from affirmative action and black economic empowerment to the complete overhaul of South African legal culture’.<sup>17</sup>

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<sup>7</sup> Section 9 of the Constitution.

<sup>8</sup> Section 10 of the Constitution.

<sup>9</sup> Section 25 of the Constitution.

<sup>10</sup> Section 26 of the Constitution.

<sup>11</sup> Section 27(1)(a) of the Constitution.

<sup>12</sup> Section 27(1)(b) of the Constitution.

<sup>13</sup> Section 33 of the Constitution.

<sup>14</sup> Such as the Occupational Health and Safety Act 85 of 1993; Mine Health and Safety Act 26 of 1996; Road Accident Fund Act 56 of 1996; Medical Schemes Act 131 of 1998; Promotion of Administrative Justice Act 3 of 2000; Unemployment Insurance Act 63 of 2001; and Social Assistance Act 13 of 2004.

<sup>15</sup> See, for example, the *Grootboom* case; *Minister of Health & others v Treatment Action Campaign & others* (2002) 10 BCLR 1033 (CC); (2002) 5 SA 713 (CC); *Soobramoney v Minister of Health (Kwazulu-Natal)* (1997) 12 BCLR 1696 (CC) (*Soobramoney*); *Khosa & others v The Minister of Social Development & others* 2004 (6) SA 505 (CC) (*Khosa*); 2004 (6) BCLR 569 (CC); and *Mashavha v President of the RSA and Others* 2004 (12) BCLR 1243 (CC).

<sup>16</sup> P Langa *Transformative constitutionalism* 17 Stellenbosch Law Review (2006) 351-360, at 351.

<sup>17</sup> M Pieterse *What do we mean when we talk about transformative constitutionalism?* 20 SA Public Law (2005) 155-166, at 155.

The term originated from the transformative role that the Constitution was supposed to play. Such a transformative role of the Constitution was first proposed by the interim Constitution, when the Epilogue stated that:

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

In addition, Constitutional Principle V in Schedule 4 of the Interim Constitution required the legal system (inclusive of the Constitution) to ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

The Preamble of the Constitution also conveys the transformative role that it envisages. It states that the people of South Africa recognise the injustices of the past and adopt the Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; to lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; to improve the quality of life of all citizens and free the potential of each person; and to build a united and democratic South Africa. Section 1 of the Constitution further provides that South Africa is founded on values such as human dignity, the achievement of equality and the advancement of human rights and freedoms

The transformative aspirations of our Constitution have been acknowledged by various scholars and jurists.<sup>18</sup> This led to the development of the concept of ‘transformative

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<sup>18</sup> The Constitutional Court held that in some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution ... What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex’ (*S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) para 262). It has also remarked that the Constitution is a document that seeks to transform the status quo ante into a new order (*Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC)). In addition, in the *Soobramoney* case (para 8) the court said ‘we live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. In *Rates Action Group v City of Cape Town* (2004 (12) BCLA 1328 (C) para 100), the court stated that ‘Ours is a transformative constitution’. Furthermore, in *City of Johannesburg v Rand Properties (Pty) Ltd and Others* (2006 (3) BCLR 728 (W) para 51-52) it was held that our Constitution encompasses a transformative provision. Albertyn and Goldblatt states that ‘Just as the interim Constitution commits itself to the creation of a new order in South Africa ... so too does the final text take up the cudgels of transformation’ (C Albertyn and B Goldblatt *Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality* 14 South African Journal on Human Rights (1998) 248-276, at 248).

constitutionalism’ in 1998.<sup>19</sup> According to Klare, transformative constitutionalism denotes a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country’s political and social institutions and power relations in a democratic, participatory and egalitarian direction. It connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law. It is transformation vast enough to be inadequately captured by the phrase ‘reform’, but something short of or different from ‘revolution’ in any traditional sense of the word. It indicates an idea of a highly egalitarian, caring, multi-cultural community, governed through participatory, democratic processes in both the polity and large portions of the ‘private sphere’.<sup>20</sup> Therefore, in his view, transformative constitutionalism connotes large scale, egalitarian social transformation.<sup>21</sup>

For almost two decades since the development of the concept, various South African scholars and jurists have contributed to the debate on the meaning and objectives of the concept.<sup>22</sup> Langa is of the opinion that since the Epilogue of the interim Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and new society based on substantive equality, transformation must be a social and an economic revolution because South Africa is contending with unequal and insufficient access to housing, food, water, healthcare and electricity.<sup>23</sup> This is because, as was stated in the *Soobramoney* case,<sup>24</sup> for as long as these conditions continue to exist the aspiration of the Constitution (to address them, and to transform our society into one in which there will be human dignity, freedom and equality) will have a hollow ring. Therefore, according to Langa:

The provision of services to all and the levelling of the economic playing fields that were so drastically skewed by the apartheid system must be absolutely central to any concept of transformative constitutionalism ... Transformation in this sense does not only involve the fulfilment of socio-economic rights, but also the provision of greater access to education and opportunities through various mechanisms, including affirmative action measures ....<sup>25</sup>

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<sup>19</sup> See KE Klare *Legal Culture and Transformative Constitutionalism* 14 South African Journal on Human Rights (1998) 146-188.

<sup>20</sup> KE Klare *Legal Culture and Transformative Constitutionalism* 14 South African Journal on Human Rights (1998) 150.

<sup>21</sup> KE Klare *Legal Culture and Transformative Constitutionalism* 14 South African Journal on Human Rights (1998) 150 *et seq.*

<sup>22</sup> See C Albertyn and B Goldblatt *Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality*; M Pieterse ‘What do we mean when we talk about transformative constitutionalism?’; P Langa *Transformative constitutionalism*; Butt D ‘Courts and the making of public policy and the social contract revisited: Transformative constitutionalism and socio-economic rights’ (Report of a lecture by the Chief Justice of South Africa (Rhodes House, Oxford (United Kingdom), 11 June 2008); T Roux *Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference* 2 Stellenbosch Law Review (2009) 258-285; K van Marle *Transformative constitutionalism as/and critique* Stellenbosch Law Review (2009) 286-301; K Klare and DM Davis *Transformative constitutionalism and the common and customary law* 26 South African Journal on Human Rights (2010) 403-431; M Rapatsa *Transformative Constitutionalism in South Africa: 20 Years of Democracy* 5 Mediterranean Journal of Social Sciences, no. 27 (2014) 887-895; J Brickhill and Y van Leeve ‘Transformative constitutionalism: Guiding light or empty slogan?’ in A Price and M Bishop *A Transformative justice: Essays in Honour of Pius Langa* (Cape Town: Juta, 2015) 141-171; TF Hodgson ‘Bridging the gap between people and the law: Transformative constitutionalism and the right to constitutional literacy’ in A Price and M Bishop *A Transformative justice: Essays in Honour of Pius Langa* (Cape Town: Juta, 2015) 189-212.

<sup>23</sup> P Langa *Transformative constitutionalism* 17 Stellenbosch Law Review (2006) 351-360, at 352 *et seq.*

<sup>24</sup> *Soobramoney* para 8.

<sup>25</sup> P Langa *Transformative constitutionalism* 17 Stellenbosch Law Review (2006) 351-360, at 353.

Langa’s opinion that the new society envisaged by the Constitution is one based on substantive equality and social transformation reflects the views of Albertyn and Goldblatt. They believe that the Constitution is the political and legal foundation for the democratic transformation of South Africa.<sup>26</sup> They understand transformation to require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. According to them, the challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.<sup>27</sup>

Pieterse concurs when he proposes an essentially social-democratic understanding of the concept as mandating the achievement of substantive equality and social justice (amongst others).<sup>28</sup> He is of the opinion that constitutional transformation includes the following: dismantling of the formal; explicit targeting and ultimate elimination of the (public and private) social structures that cause and reinforce inequality; the redistribution of social capital along egalitarian lines; an explicit engagement with social vulnerability in all legislative, executive and judicial action; and the empowerment of poor and otherwise historically marginalised sectors of society through pro-active and context-sensitive measures that affirm human dignity.<sup>29</sup>

It is clear from the debate by South African scholars and jurists that given South Africa’s history (including the history of its social security system), the achievement of (substantive) equality and social transformation are amongst the objectives of transformative constitutionalism. This is further given credence by the entrenchment of the right of access to social security as well as the rights to equality and human dignity. The realisation of the right of access to social security for everyone is also aimed at the achievement of (substantive) equality and social transformation through law. The realisation of this right is thus instrumental to the achievement of transformative constitutionalism.

### **3. South Africa’s pre-1994 social security system**

As its Preamble states, the Constitution recognises the injustices of South Africa’s past. This injustice was in every sphere of society, including the social sphere. The social security system is one such sphere where there was injustice; and which the Constitution strives to address. The social security system can be divided into social insurance and social assistance schemes.<sup>30</sup> Social insurance schemes in South Africa consist of the Unemployment Insurance

<sup>26</sup> C Albertyn and B Goldblatt *Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality* 14 *South African Journal on Human Rights* (1998) 248-276, at 248.

<sup>27</sup> C Albertyn and B Goldblatt *Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality* 14 *South African Journal on Human Rights* (1998) 248-276, at 249.

<sup>28</sup> M Pieterse *What do we mean when we talk about transformative constitutionalism?* 20 *South African Public Law* (2005) 155-166, at 156.

<sup>29</sup> See M Pieterse *What do we mean when we talk about transformative constitutionalism?* 20 *South African Public Law* (2005) 155-166, at 159 (and the authorities cited therein).

<sup>30</sup> The Department of Social Development states that social insurance is the contributory pillar of the social security system aimed at protecting employees and their dependents, through insurance, against contingencies which interrupt income. Social insurance covers contingencies such as pensions or provident funds, medical benefits, maternity benefits, illness, disability, unemployment, employment injury benefits, and survivor’s benefits, for employees who are in formal employment. On its part, social Assistance is a set of non-contributory Government programmes aimed at supporting vulnerable groups such as children, the elderly, people with disabilities, etc. The primary aim of social assistance which is paid in a form of a monthly social

Fund, the Road Accident Fund and the Compensation for Occupational Injuries and Diseases. Health care is provided mainly through the public health care system, although private and occupational schemes also exist for medical (and retirement) insurance.

In relation to compensation for occupational injuries and diseases, occupational health legislation was advocated for by organised and unionised white labour in the early 1900s.<sup>31</sup> State regulated compulsory annual x-rays and medical examinations for white miners were also instituted in 1916.<sup>32</sup> It has also been held that the Miners’ Phthisis Act introduced regulations for periodical medical examination and the compensation for silicosis, initially for white miners and only later, with racially discriminatory provisions, for black miners. The Occupational Diseases in Mines and Works Act was enacted in 1973,<sup>33</sup> also with discriminatory provisions. As one commentator has remarked:

Black miners would have to wait until 1993 for the last racist legislation on the statute books, for all clauses instituting differentiating provisions on the basis of populations groups, to be removed so that all the *de jure* provisions of the ODMWA applied equally to them.<sup>34</sup>

The social assistance component of the system was first introduced in 1928 in the form of an old age grant for whites and coloureds only. However, it was extended to all races in 1944.<sup>35</sup> Despite its extension to all races, the benefit levels were highly discriminatory with the amount of the grant for whites being 7.5 times higher than that for Africans in 1965. The racial gap gradually narrowed after 1965, and the benefit levels became equal among all races in 1993.

In relation to health care, South Africa developed separate public and private healthcare systems for different categories of people during apartheid.<sup>36</sup> The public sector focused exclusively on the low-income earners, the unemployed and the indigent who could not afford to pay for healthcare and who were without medical scheme cover. The private health care sector focused on the young and healthy employed population, who could afford to pay for healthcare and who contributed to a medical scheme.<sup>37</sup>

Health care provision in South Africa has historically been influenced by various factors, including income, geographical location and race or ethnicity.<sup>38</sup> The pre-constitutional health

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grant to eligible beneficiaries is to ensure that people do not fall below a certain standard of living (Department of Social Development *An overview of South Africa’s social security system* (Pretoria, undated) 4-5).

<sup>31</sup> See, for example, Miners’ Phthisis Act of 1911; Workmen’s Compensation Act of 1914; Silicosis Act of 1925, Pneumoconiosis Act of 1956; and Pneumoconiosis Compensation Act of 1962.

<sup>32</sup> J Roberts *The Hidden Epidemic Amongst Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Works Act in the Eastern Cape, South Africa* (Durban: Health Systems Trust, June 2009) 17-18.

<sup>33</sup> Occupational Diseases in Mines and Works Act (ODMWA) 78 of 1973 as amended in 1993 and 2002.

<sup>34</sup> J Roberts *The Hidden Epidemic Amongst Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Works Act in the Eastern Cape, South Africa* ((Durban: Health Systems Trust, June 2009) 18.

<sup>35</sup> Department of Social Development *An overview of South Africa’s social security system* (Pretoria, undated) 1.

<sup>36</sup> HD McLeod *Mutuality and solidarity in healthcare in South Africa* 5 *South African Actuarial Journal* (2005) 135–167, at 137. See also Department of Health *Inquiry into the Various Social Security Aspects of the South African Health System: Policy Options for the Future* (Pretoria, May 2002).

<sup>37</sup> Department of Health *Inquiry into the Various Social Security Aspects of the South African Health System: Policy Options for the Future* (Pretoria, May 2002).

<sup>38</sup> HCJ van Rensburg and A Fourie *Health care in South Africa: Structure and dynamics* (Pretoria: Academica, 1992) 56-94.

system was considered unequal and dysfunctional.<sup>39</sup> It has been described as “a bureaucratic entanglement of racially and ethnically fragmented services; wasteful, inefficient and neglectful of the health of more than two-thirds of the population.”<sup>40</sup> The health care system faced many problems, such as the dominance of curative-oriented health care; the intensification of racial and ethnic segregation in the provision of health care services; the functional fragmentation of service provision by different national authorities; the accentuation of rural-urban discrepancies and inequalities in the provision of services; and the growth of a dual structure of health care in which the private sector was repeatedly augmented at the expense of the public sector. The problems faced by the health system were caused by a combination of official policy, discriminatory legislation and sometimes benign neglect.<sup>41</sup>

This context of the South African social security system (amongst other things) was recognised at the time of the drafting of the Constitution. This is acknowledged by the Constitutional Court when it held that:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, *inadequate social security*, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.<sup>42</sup>

The Court further held that the constitutional commitment to address these conditions is expressed in the preamble which, after giving recognition to the injustices of the past; states the objectives of the Constitution; and is also reflected in various provisions of the Bill of Rights and in particular in sections 26 and 27 which deal with housing, health care, food, water and social security.<sup>43</sup>

#### **4. Constitution’s transformative aspirations: framework of social security**

Before evaluating the right of access to social security, it is necessary to ascertain the meaning of the concept. Therefore, this section briefly discusses the concept of social security in South Africa and then analyses the constitutional framework of social security.

##### ***4.1 The concept of social security in South Africa***

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<sup>39</sup> C Ngwenya and R Cook “Rights concerning health” in D Brand and C Heyns *Socio-economic rights in South Africa* (Pretoria: Pretoria University Law Press, 2005) 127.

<sup>40</sup> Medical Research Council *Changing health in South Africa: Towards new perspectives in research* (1991) as quoted in C Ngwenya and R Cook “Rights concerning health” in D Brand and C Heyns *Socio-economic rights in South Africa* (Pretoria: Pretoria University Law Press, 2005) 127.

<sup>41</sup> See C Ngwenya and R Cook “Rights concerning health” in D Brand and C Heyns *Socio-economic rights in South Africa* (Pretoria: Pretoria University Law Press, 2005) 127 *et seq.*

<sup>42</sup> *Soobramoney* para 8. See also *Azanian People Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 43, where the Court said ‘The families of those whose fundamental human rights were invaded by torture and abuse are not the only victims who have endured “untold suffering and injustice” in consequence of the crass inhumanity of apartheid which so many have had to endure for so long. Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many....’

<sup>43</sup> *Soobramoney* para 9.

The concept of social security in South Africa has developed from the traditional definition proposed by the International Labour Organisation to a more comprehensive approach.<sup>44</sup> Social security has thus been broadened from an income situation to include general basic needs and the range of contingencies was also widened.<sup>45</sup> This approach was adopted by the South African White Paper on Social Welfare.<sup>46</sup> The White paper concluded that social security is a system geared towards the provision of a national integrated and sustainable social security system with universal access, with the ultimate goal being to ensure that all South Africans have a minimum income, sufficient to meet basic subsistence needs and should not have to live below minimum acceptable standards.<sup>47</sup>

The view of the concept as a general system of basic social support no longer linked to the regular employment relationship and founded on the conviction that society as a whole is responsible for its weaker members was termed social protection.<sup>48</sup> The United Nations Commission on Social Development states that social protection embodies society's responses to levels of either risk or deprivation, and includes secure access to income, livelihood, employment, health and education services, nutrition and shelter.<sup>49</sup>

This broad approach to the concept has been adopted by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa when it developed the concept of “comprehensive social protection”, due to its merits for the country.<sup>50</sup> According to the Committee, comprehensive social protection seeks to provide the basic means for all people living in South Africa to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.<sup>51</sup> It consists of certain core elements which should be available to all South Africans – including certain categories of non-citizens – and need to be established in a universal-as-possible package of basic income

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<sup>44</sup> The International Labour Organisation views social security as the protection that society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age, and death; the provision of medical care; and the provision of subsidies for families and children (Social Security (Minimum Standards) Convention 102 of 1952; and International Labour Organisation *Introduction to Social Security* (Geneva: International Labour Office, 1989) 3). This definition was deemed to be too restrictive and narrow for the problems faced by developing countries like South Africa (see MP Olivier “The Concept of Social Security” in MP Olivier *et al* (eds.) *Social Security: A Legal Analysis* (Durban: LexisNexis 2003) 4).

<sup>45</sup> Getubig IP and Schmidt S (eds.) *Rethinking Social Security: Reaching Out to the Poor* (Kuala Lumpur: Asian and Pacific Development Centre, 1992).

<sup>46</sup> The White Paper states that social security means policies that ensure adequate economic and social protection during unemployment, ill health, maternity, child bearing, widowhood, disability, old age, social assistance in relation to old age, disability, child and family care and poverty relief. Social security therefore covers a variety of public and private measures that provide cash and in-kind benefits or both (firstly, in the event of an individual’s earning capacity permanently ceasing, being interrupted, never having developed or being exercised only at unacceptable social cost and such a person being unable to avoid poverty; and, secondly, in order to maintain children). As such it is aimed at poverty prevention, poverty alleviation, social compensation and income distribution (White Paper on Social Welfare (GN 1108 in GG 18166 of August 1997) Chap. 7, para 1).

<sup>47</sup> White Paper on Social Welfare, Chapter 7, para 27.

<sup>48</sup> B Von Maydell “Fundamental Approaches and Concepts of Social Security” in R Blanpain *Law in Motion* (Leiden: Kluwer Law International, 1997) 1034.

<sup>49</sup> United Nations *Enhancing Social Protection and Reducing Vulnerability in a Globalising World: Report of the Secretary-General* 39th session of the Commission for Social Development (New York, 13-23 February 2000).

<sup>50</sup> Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future* (Draft Consolidated Report) (Pretoria, March 2002) 40.

<sup>51</sup> *Ibid.*

transfers, services and assets, with access provided in a non-work-related manner and whose availability is not primarily dependent on an ability to pay.<sup>52</sup>

#### **4.2 Values underpinning the Constitution**

The right of access to social security seeks to promote the values that inform and underpin the objectives of the Constitution. Constitutional values lie at the heart of the Bill of Rights,<sup>53</sup> and are important in the interpretation and enforcement of the rights entrenched therein.<sup>54</sup> The Constitutional Court has stated that the fundamental rights in the Bill of Rights are entrenched because South Africa is a society that values human beings and wants to ensure that people are afforded their basic needs; and that a society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.<sup>55</sup>

Therefore, the right to have access to social security must be interpreted in the light of underlying constitutional values, as well as the interests that that right is meant to protect. Analysis of the values and purpose of the right provides the right with its substantive content.<sup>56</sup> These constitutional values are instrumental to the establishment of a social security framework as the framework must seek to promote these values.

Section 27(1)(c) guarantees everyone the right to have access to social security. This means equality in respect of access to social security is implicit in the reference to everyone in that section. Equality is a foundational value that informs constitutional interpretation, as well as a fundamental right.<sup>57</sup> The right to equality has sometimes formed the basis for demands that rights that are afforded to a person or category of persons be extended to another person or category of persons.<sup>58</sup>

The right to equality has both formal and substantive dimensions.<sup>59</sup> Formal equality entails the prohibition of unjustified discrimination, in the sense that all persons must be treated in the same manner, irrespective of their circumstances. Since formal equality requires sameness of treatment, which implies that everybody should be treated equally irrespective of their circumstance, it ignores economic and social disparities between individuals or groups of persons.<sup>60</sup>

However, the Constitution requires the socio-economic upliftment of economically and socially deprived persons for the achievement of equality.<sup>61</sup> Equality in term of access to social security must thus be interpreted as a whole, with “a broad judicial examination of

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<sup>52</sup> *Ibid* 42.

<sup>53</sup> *Khosa* case para 85.

<sup>54</sup> See sections 36 and 39 of the Constitution. For more on the impact of constitutional values in interpreting the constitution and understanding its fundamental purpose, see *S v Mlungu* para 111.

<sup>55</sup> *Grootboom* case as quoted in the *Khosa* case para 52.

<sup>56</sup> C Albertyn and B Goldblatt “Section 9 – the right to equality” (Paper presented at the Constitutional Law of South Africa Conference, Constitution Hill, 29 March 2006) 1.

<sup>57</sup> Sections 1 and 9 of the Constitution.

<sup>58</sup> An example of this can be seen in the *Khosa* case where the court extended access to social assistance permanent residents on the basis that (*inter alia*) their exclusion unfairly discriminated against them in contravention of section 9 (3) of the Constitution.

<sup>59</sup> Sections 9(1) and 9(3).

<sup>60</sup> I Currie and J De Waal *The Bill of Rights Handbook* (Cape Town: Juta, 2005) 233.

<sup>61</sup> GE Devenish *A Commentary on the South African Bill of Rights* (Durban: Butterworths, 1999) 39.

equality relating to both formal and substantive issues”,<sup>62</sup> i.e. a concept of equality that goes beyond formal equality is then required.

Section 9(2) indicates that the Constitution requires a substantive approach to equality.<sup>63</sup> Substantive equality aims to promote the attainment of equality by focusing on outcomes. It requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.<sup>64</sup> In this case, the economic and social conditions of individuals or groups of persons are taken into account in determining the attainment of equality. Substantive equality dictates that the equality provisions could be used to address historical imbalances by granting more favourable treatment to the historically and socially disadvantaged.

Therefore, one purpose of equality, as a constitutional value and a fundamental right, is to remedy historical disadvantage and material inequalities. A substantial approach to equality permits and requires positive measures, tailored for the needs of particular individuals and groups, to address inequality and remedy disadvantage, thus creating the conditions for full and equal participation in society.<sup>65</sup>

The need for the adoption of substantive equality is further necessitated by the Constitution’s focus on particularly vulnerable and desperate persons. The State’s constitutional obligations require that the State protects particularly vulnerable and desperate persons and groups. The Constitutional Court has stated that the State has to make provision for the most vulnerable and desperate in society.<sup>66</sup> In the case of social assistance applicants or beneficiaries, who are indigent and have to satisfy the means (income and asset) test to qualify for benefits, their particularly vulnerable and desperate status is indisputable. This points to the need for the establishment of a social security system, especially a social assistance scheme and other social welfare services for some categories of vulnerable persons.

Human dignity is also a foundational value and a fundamental right that informs the establishment of the social security system.<sup>67</sup> It is a value that informs the interpretation of possibly all rights.<sup>68</sup> Like equality, the achievement of human dignity is one of the objectives of the social security system. Chaskalson has remarked that:

“... as an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and

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<sup>62</sup> D Davis “Equality and Equal Protection” in D van Wyk, J Dugard, B de Villiers and D Davis (eds.) *Rights and Constitutionalism* (Wotton-under-Edge: Clarendon Press, 1994) 207.

<sup>63</sup> Section 9(2) states that equality includes the full and equal enjoyment of all rights and freedoms.

<sup>64</sup> I Currie and J De Waal *The Bill of Rights Handbook* (Cape Town: Juta, 2005) 233.

<sup>65</sup> MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law: The Bill of Rights* (Durban: Butterworths, 2002) 57 and 76. See also *Brink v Kitschoff NO* 1996 6 BCLR 752 (CC); and *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

<sup>66</sup> *Grootboom* (paras 52 and 69) where the failure to make express provision to facilitate access to temporary (housing) relief for people who have no access to land, no roof over their heads or who live in intolerable conditions was found to fall short of the obligation set by s 26(2) in the Constitution.

<sup>67</sup> Sections 1, 7(1) and 10 of the Constitution. Section 7(1) states that the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. Section 10 states that everyone has inherent dignity and the right to have their dignity respected and protected.

<sup>68</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 35.

values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care food, water or in the case of persons unable to support themselves, without appropriate social assistance? ....<sup>69</sup>

#### ***4.3 Right of access to social security***

The right of access to social security vests in ‘everyone’. The word ‘everyone’ is a term of general import and unrestricted meaning. It means what it conveys, which is that once the State establishes a social welfare system, everyone has a right to have access to that system.<sup>70</sup> Therefore, universal access is absent if persons who are in need are excluded.

Access to social security and its supporting rights is necessary due to their impact on the realisation of the founding values of the Constitution and enjoyment of the other rights in the Bill of Rights. In the *Khosa* case, the Constitutional Court stated that socio-economic rights must be understood in the context of the founding values of our Constitution. The right of access to social security, like all other socio-economic rights in the Constitution, is closely related to the founding values of human dignity, equality and freedom. Access to socio-economic rights is crucial to the enjoyment of the other rights mentioned in the Bill of Rights, in particular the enjoyment of human dignity, equality and freedom.<sup>71</sup> The protection of the right of access to social security also seeks to promote equality, as section 27 entitles everyone to have access to socio-economic rights.<sup>72</sup> It is also protected to ensure a person’s dignity, as the protection of a person’s dignity is the core aim and basis for social security and other socio-economic rights.<sup>73</sup> As has been remarked, there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.<sup>74</sup>

Access to social security is protected because of the impact apartheid had on the quality of life of many South Africans and their enjoyment of socio-economic rights. Social security thus seeks to realise some of the aims of the Constitution. The right is also guaranteed because South Africa values human beings and wants to ensure that people are afforded their basic needs.<sup>75</sup> As stated in the *Grootboom* case, a society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society based on human dignity, equality and freedom.<sup>76</sup> There is an obligation on the State to provide for people’s basic needs and to ensure they have access to food, clean water and shelter. The social security system is vital for those who cannot meet these basic needs for themselves or their families as it enables people to avoid destitution and affords that their basic needs are met upon stoppage or disruption of their income or their earning potential never developing. It also ensures complete protection against human damage, an adequate standard of living and protection

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<sup>69</sup> A Chaskalson *Human Dignity as a Foundational Value of our Constitutional Order* 16 South African Journal on Human Rights (2000) 193, at 204.

<sup>70</sup> *Khosa* para 111.

<sup>71</sup> *Khosa* para 104.

<sup>72</sup> *Khosa* para 42.

<sup>73</sup> LJ van Rensburg and L Lamarche “The right to social security and assistance” in D Brand and C Heyns (eds.) *Socio-economic rights in South Africa* (Pretoria: Pretoria University Law Press, 2005) 235.

<sup>74</sup> *Grootboom* para 23.

<sup>75</sup> *Khosa* para 52.

<sup>76</sup> *Grootboom* para 44.

against destitution.<sup>77</sup> Social security serves to protect people from the life-threatening and degrading conditions of poverty and material insecurity.<sup>78</sup>

Section 27(1)(c) guarantees a ‘right to have access to’ and not ‘a right to’ social security. Although ‘right to have access to’ was previously considered as qualifying or limiting rights, it has been held that ‘right to have access to’ in sections 26 and 27 is a much wider notion than ‘right to’.<sup>79</sup> In the *Grootboom* case, the court stated that

“the right delineated in section 26 (1) is a right of “access to adequate housing” as distinct from the right to adequate housing .... This difference is significant. It recognizes that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met. There must be land, there must be services, there must be a dwelling. Access to land for the purposes of housing is therefore included in the right.”<sup>80</sup>

Social security intersects with and reinforces other rights in the Constitution (especially the rights to equality, human dignity and life).<sup>81</sup> This is because constitutional rights are interrelated, interdependent and mutually supporting.<sup>82</sup> Their interrelated nature has significance in a society founded on the values of human dignity and equality.<sup>83</sup> They must all be read together in the setting of the Constitution as a whole and their interconnectedness must be taken into account when they are interpreted. In the opinion of the Constitutional Court, affording socio-economic rights to all people enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.<sup>84</sup>

The Constitutional Court also held that realising a particular socio-economic right would require that other elements which form the basis of other socio-economic rights must be in place as well. This is because together, these rights have a significant impact on the dignity of people and their quality of life. In the Court’s view:

“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 dependants, that would be relevant to the state’s obligations in respect of other socio-economic rights.”<sup>85</sup>

The interrelated nature of rights is also relevant in determining whether the State has fulfilled its constitutional obligations. In the *Khosa* case, the Constitutional Court held that:

“when the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources

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<sup>77</sup> *Khosa* para 114.

<sup>78</sup> R Liffman “Social Security as a Constitutional Imperative: An Analysis and Comparative Perspective with Emphasis on the Effect of Globalisation on Marginalisation” in MP Olivier and ER Kalula (eds.) *The Extension of Social Security Protection in South Africa* (Cape Town: Siber Ink, 2001) 41.

<sup>79</sup> See the *Grootboom* case.

<sup>80</sup> *Grootboom* para 35.

<sup>81</sup> *Khosa* para 41.

<sup>82</sup> *Grootboom* para 24.

<sup>83</sup> *Khosa* para 40.

<sup>84</sup> *Grootboom* para 23.

<sup>85</sup> *Grootboom* para 36.

in determining whether the state has complied with the constitutional standard of reasonableness. This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. What is relevant may vary from case to case depending on the particular facts and circumstances ...”<sup>86</sup>

The Court further stated that even where the State may be able to justify a limitation of the right of access to social security through the provisions in section 27(2), the criteria upon which they choose to limit the right must be consistent with the Bill of Rights as a whole. Thus, if the means chosen by the legislature to give effect to the State’s positive obligation under section 27 unreasonably limits other constitutional rights, this too must be taken into account.<sup>87</sup>

#### ***4.4 State’s constitutional obligations***

The Constitution requires its obligations to be fulfilled;<sup>88</sup> and for the State to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>89</sup> Section 27(2) further obliges the State to take affirmative steps to give effect to the right.<sup>90</sup> All of these indicate the imposition of multi-level obligations on the State to establish the new society envisaged by the Constitution based on substantive equality and social transformation, with both negative and positive components.<sup>91</sup>

The duty to ‘respect’ requires negative action, i.e. the State and other actors should not unreasonably limit or unjustly interfere with the right of access to social security.<sup>92</sup> This implies that section 27(1)(c) accords every person the right not to have his/her access to social security subjected to undue and unjustified interference and/or restriction. Actions or omissions that unreasonably impair the right to participate in a social security scheme (especially a social insurance scheme which is without budgetary implications for the State) would constitute unreasonable violations of the State’s duty to respect the right of access to social security.<sup>93</sup>

The duty to ‘protect’ requires the State to take measures to ensure that third parties do not deprive individuals of their access to a right.<sup>94</sup> Fundamental rights oblige the State to protect

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<sup>86</sup> *Khosa* para 44.

<sup>87</sup> *Khosa* para 45.

<sup>88</sup> Section 2 of the Constitution.

<sup>89</sup> Section 7(2) of the Constitution.

<sup>90</sup> D Brand “Introduction to socio-economic rights in South Africa” in D Brand and C Heyns (eds.) *Socio-economic rights in South Africa* (Pretoria: Pretoria University Law Press, 2005) 2.

<sup>91</sup> See *Grootboom* para 34.

<sup>92</sup> See *Grootboom* para 34.

<sup>93</sup> See *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) paras 13-17 where the Constitutional Court held that although it was clear that section 35 of the Compensation for Occupational Injury and Diseases Act 130 of 1993 (which prevents employees from claiming damages from their employers, except where provided for in the Act) differentiated between employees and non-employees, the legitimate purpose of the Act is to provide a system of compensation for employees for disability or death caused by injuries or diseases in the workplace. Such a system supplants the common law right of an employee to damages from a negligent employer. Instead, it allows the employee to claim limited compensation from a fund (to which employers are obliged to contribute) even where the employer was not negligent. Viewed in the context of the Act as a whole, section 35 was not arbitrary or irrational. It also did not favour employers only, and as such was rationally connected to the legitimate purpose of the Act.

<sup>94</sup> G Budlender *Access to Courts* 121 South African Law Journal (2004) 339-358, at 346.

persons from interference with their rights.<sup>95</sup> Such as obligation mandate the setting up a framework wherein individuals can realise these rights without undue influence from others.

The duty to ‘promote’ means the State must publicise the rights and inform bearers on how the rights can be accessed and enforced (actively educate the bearers of rights about these rights). The beneficiary has the right to require positive assistance or a benefit or service from the State. In *Minister of Health & others v Treatment Action Campaign & others*, the court held that in order for the measures adopted by the State to realise the right (of access to health care services) to be reasonable, they ‘must be made known effectively to all concerned.’<sup>96</sup>

The duty to ‘fulfil’ expects the State to adopt measures to assist people to enjoy the right, to strengthen people’s access to and utilisation of resources and means to enjoy the right. This means that where a person is unable to enjoy the right through their own means, the State has an obligation to fulfil or provide that right directly.<sup>97</sup> In the *Grootboom* case the Constitutional Court held that the State has a duty to provide emergency shelter to particularly needy and vulnerable groups of people, should they not be able to provide in this for themselves. Therefore, the duty to fulfil a right plainly obliges the State to take positive measures that enable and assist individuals to enjoy the right. According to Liebenberg, the duty to ‘fulfil’:

‘... requires the state to take positive measures to assist those who currently lack access to the rights to gain access to them. This includes the adoption of “enabling strategies” to assist people to gain access to the rights through their own endeavours and initiatives, as well as more direct forms of assistance to groups in especially vulnerable or disadvantaged circumstances.”<sup>98</sup>

This is especially the case with social security, which grants everyone the right of access. This means that individuals should be enabled to provide for their own protection as well as that of their dependants. However, the right further requires the State to provide non-contributory social assistance to those who are unable to support themselves and their dependants.

Constitutional rights also place a duty on the State to act rationally and in good faith, justifying its failure to fulfil its obligations.<sup>99</sup> Section 27(2) expects the state to adopt reasonable legislative and other measures to progressively realise the right of access to social security. It may therefore be expected to provide valid reasons of its failure to respect, protect, promote and fulfil the right.

Reading section 27(2) with sections 2 and 7(2), the conclusion is that there is a clear and unambiguous undertaking by the drafters of the constitution to develop a comprehensive social security system, based on, *inter alia*, two important paradigms: the right of access to

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<sup>95</sup> K O’Regan *Introducing socio-economic rights* 1 Economic and Social Rights Review no. 4 (1999) 2.

<sup>96</sup> *Minister of Health & others v Treatment Action Campaign & others* para 123. See also Liebenberg S “The interpretation of socio-economic rights” in M Chaskalson and S Woolman *Constitutional Law of South Africa* (Cape Town: Juta, 2003) chapter 33, 5.

<sup>97</sup> G Budlender *Access to Courts* 121 South African Law Journal (2004) 339-358, at 346.

<sup>98</sup> S Liebenberg ‘Socio-economic rights’ in M Chaskalson and S Woolman *Constitutional Law of South Africa* (Cape Town: Juta, 1998) 41-43.

<sup>99</sup> K O’Regan *Introducing socio-economic rights* 1 Economic and Social Rights Review no. 4 (1999) 2.

social security for everyone, and financial viability. It is clear that the Constitution imposes an obligation on the state to ensure universal access to social security.<sup>100</sup>

There is a positive duty on the State to set up legislative and institutional mechanisms where everyone can realise his/her right of access to social security. Legislation and other measures must be formulated to ensure equal and non-discriminatory access to everyone, especially the needy and vulnerable. As the Court held in relation to similar duties in section 26(2), this imposes a positive obligation upon the State “to devise a comprehensive and workable plan to meet its obligations in terms of the subsection”.<sup>101</sup> The Court added that:

“the state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation.”<sup>102</sup>

However, measures adopted by the State are only evaluated in relation to their reasonableness. This means they need to meet the criteria in section 27(2) and 36 of the Constitution. These are, respectively, the internal and external limitation clauses for the right of access to social security.

The State’s duties in relation to access to social security are qualified by the phrasing of section 27(2). Therefore, the State must only satisfy three requirements in its obligation to realise the right: take reasonable measures; within its available resources; to progressively realise the right. It has been held that the State fulfils its obligations if the measures adopted are reasonable, both in their conception and implementation.<sup>103</sup> Consideration of reasonableness does not enquire whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent, but whether the measures adopted are reasonable. In *Minster of Health and Others v Treatment Action Campaign and Others*, the court stated that section 27 does not entitle everyone to demand a minimum core. In *Grootboom*, the Court said all that is possible or that can be expected of the State is that it acts reasonably to provide access on a progressive basis.<sup>104</sup> It held that:

“... reasonableness must also be understood in the context of the Bill of Rights as a whole. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”<sup>105</sup>

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<sup>100</sup> MP Olivier “Constitutional Issues” in MP Olivier *et al Social Security: A Legal Analysis* (Durban: LexisNexis, 2003) 58.

<sup>101</sup> *Grootboom* para 38.

<sup>102</sup> *Grootboom* para 42.

<sup>103</sup> *Grootboom* para 63.

<sup>104</sup> *Grootboom* para 35.

<sup>105</sup> *Grootboom* para 44.

The reasonableness of the state’s measures is evaluated against the social, economic and historical context of the system the measure aims to address; whether the programme is balanced, flexible and open to review, and make appropriate provision for attention to the deficiencies in the system and to short-, medium- and long-term needs; whether the programme is inclusive and does not exclude a significant segment of society; whether the measures ensure that basic human needs are met and take into account the degree and extent of the denial of the right they endeavour to realise; and whether the programme and measures ensue that a larger number of people and a wider range of people benefit from them as time progresses.<sup>106</sup>

‘Within its available resources’ means the State is not expected to do more than its available resources permit. There is no unqualified obligation on the State to meet existing needs. Both the content of the obligation in relation to the rate at which it is achieved, and the reasonableness of the measures employed to achieve the result are subject to the availability of resources.<sup>107</sup> As stated in *Sobramoney*:

“What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled ....”<sup>108</sup>

However, the State must make provisions for the extremely vulnerable.<sup>109</sup> This means those in desperate need must be provided with immediate relief and should not have to wait for medium or long-term measures designed to ensure the progressive realisation of their rights. In the case of the social assistance framework, financial and other resource constraints could be a relevant factor in accessing the State’s ability to extend or universalise the scheme because of the fiscal and macro-economic implications of this.

“Progressive realisation” shows that it was never contemplated for the right to be realised immediately. Even where the State’s policy fails to meet constitutional standards because it excludes those who could reasonably be included, that does not mean everyone can immediately claim access to the right.<sup>110</sup> However, goal is the basic needs of all in society to be effectively met. Progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time; and that rights must be made more accessible, not only to a larger number of people, but to a wider range of people as time progresses.<sup>111</sup>

In terms of section 36(1) of the Constitution, a right in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the

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<sup>106</sup> *Grootboom* paras 42-45. See also Committee of Inquiry into a Comprehensive System of Social Security in South Africa: *Transforming the Present – Protecting the Future* (Pretoria, 2002) 51.

<sup>107</sup> *Grootboom* para 46.

<sup>108</sup> *Sobramoney v Minister of Health (Kwazulu-Natal)* para 11.

<sup>109</sup> *Grootboom* para 44.

<sup>110</sup> *Treatment Action Campaign* para 125.

<sup>111</sup> *Grootboom* para 45.

purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. This includes ascertaining whether the limitation serves a legitimate purpose of sufficient importance; whether there is a sufficient relationship between the limitation and the purpose (i.e. whether the limitation does not restrict the right in question more than is necessary); and whether there is no other reasonable alternative to attain the objective.

State action/ inaction is reviewed according to the principles of proportionality (rationality) and reasonableness (balance). The tests of reasonableness and justifiability require the competing interests and values that it impairs and promotes to be weighed against one another for an appraisal of their proportionality.<sup>112</sup> In terms of the principle of proportionality, the court sets aside an act or omission which restricts the right unnecessarily or gratuitously. Consideration must also be given to the importance of the right in evaluating the proportionality of the measures taken.<sup>113</sup> Under the principle of reasonableness or balance, an act/omission is declared unconstitutional if there is a radical imbalance between the public interest served by the act/omission and the limitation infringing the right. In *S v Makwanyane and Another*, the Constitutional Court held that in evaluating proportionality and reasonableness, issues to be considered include:

“... the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.”<sup>114</sup>

## 5. Realising social transformation: the social security system

The right of access to social security is pivotal in achieving the transformative agenda of the Constitution. As seen above, the injustices and discriminatory policies of apartheid hindered millions of South African from enjoying their socio-economic rights. Thus, the main goal of a social security system is to reduce poverty and inequality by improving health outcomes, increasing school attendance, reducing hunger, improving dietary diversity and to serve as a safety net in the event of a livelihood shock, such as loss of a job, illness or the death of a breadwinner.<sup>115</sup> Social benefits also encourage meaningful participation in the labour force, building self-reliance and reducing dependency.<sup>116</sup> The social security system is divided into social insurance and social assistance schemes.

### 5.1 Social insurance schemes

The social insurance system comprises of (*inter alia*) schemes regulated by the Compensation for Occupational Injuries and Diseases Act,<sup>117</sup> and the Occupational Diseases in Mines and Works Act.<sup>118</sup> These schemes, through their respective compensation funds, provide cash

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<sup>112</sup> *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), para 15.

<sup>113</sup> *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC) para 34.

<sup>114</sup> *S v Makwanyane and Another* para 104.

<sup>115</sup> PT Jacobs, M Baiphethi, N Ngcobo and T Hart *The Potential of Social Grants Expenditure to Promote Local Economic Development and Job Creation* (Pretoria: Human Sciences Research Council, 2010) 25.

<sup>116</sup> *Ibid*, 25 *et seq.*

<sup>117</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993 (hereinafter referred to as COIDA).

<sup>118</sup> Occupational Diseases in Mines and Works Act 78 of 1973 (hereinafter referred to as ODMWA).

benefits to formal sector workers who have sustained injuries and occupational diseases (in the case of ODMWA lungs diseases) in the course of their employment, as well as income benefits to survivors of victims who have sustained occupational injuries or diseases that leads to death. The Unemployment Insurance Act<sup>119</sup> established an Unemployment Insurance Fund that pays unemployment insurance benefits to certain categories of employees as specified the act, including domestic workers.<sup>120</sup> The aim of the act is to establish an Unemployment Insurance Fund (hereinafter referred to as UIF).

As far as coverage is concerned, the Quarterly Labour Force Survey for the fourth quarter of 2016 (October to December), indicates that the working age population (15-64 years) was 36.9 million persons and the labour force was 21.85 million people.<sup>121</sup> A total of just over 16 million people were employed, with 11.156 employed in the formal (non-agricultural) sector; 2.6 million employed in the informal (non-agricultural) sector; just under 1 million employed in agriculture; and about 1.3 million employed in private households.<sup>122</sup> Some of the schemes tend to exclude vulnerable workers such as domestic workers, independent contractors and the self-employed that are injury prone, considering the poor nature of their jobs and may be exposed to high work related risk (such as COIDA).<sup>123</sup> The Unemployment Insurance Act also excludes independent contractors. The exclusion of certain categories of employees from the scope of coverage of some social insurance laws means that less than the 16 million people employed in the fourth quarter of 2016 had access to such schemes.

It is clear that these workers have no access to any form of assistance as far as the social insurance schemes are concerned. Their only hope would be the social assistance scheme which they will be eligible by attaining the age of 60 (old age grant) or if they sustain an injury (disability grant).

This is against the constitutional rights of equality and dignity. Being excluded from social insurance, this group of people end up living a life of destitute when an occupational injury or disease occurs, because they would not have the means to take care of themselves during the period when they would be out of any gainful activity. The Constitution, imposes an obligation on the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of social security. However, social insurance is a contributory scheme, which requires no financial obligation from the state to extend coverage to those excluded. Being a contributory scheme, the state is only required to make reasonable legislative measures to make the schemes more inclusive. More so, the short-coming of these schemes is not only limited to their scope of coverage but also the benefits provided by some of these schemes are inadequate. As an example, ODMWA pays out benefits as a lump sum instead of a monthly pension. Providing just lump sum benefit payments proves to be inadequate as beneficiaries may not be astute enough to manage their income so that it lasts for as long as they live. Even in situations where a monthly pension is paid to beneficiaries, it usually turns out to be inadequate, as a result of erosion of the

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<sup>119</sup> Unemployment Insurance Act 63 of 2001.

<sup>120</sup> Section 1(1) of UIA

<sup>121</sup> Statistics South Africa *Quarterly Labour Force Survey: Quarter 4: 2016* (Pretoria: Statistics South Africa (2016) 1.

<sup>122</sup> *Ibid.*

<sup>123</sup> Section 1 (xix)(d) of COIDA

purchasing power of pensions by inflation due to lack of in the absence of the indexing of pensions benefits for inflation.<sup>124</sup>

## 5.2 Social Assistance scheme

The South African social assistance scheme is regulated by the Social Assistance Act, which pays out grants to a certain category of people who are deemed as the needy in the society.<sup>125</sup> The social assistance scheme is non-contributory in nature in the sense that recipients of such a scheme do not make any contribution to the said scheme. The scheme is based on state funds, as payments are made on the basis of an annual budgetary allocation. Social assistance is made available to children (child support grants, foster care grants and care dependency grants); for the elderly (old age grant and war veterans’ grants); and for the disabled (disability grant). Social relief of distress is also provided, which is the temporary provision of assistance to persons in such dire need that they are unable to meet their or their families’ most basic needs.

The social assistance scheme is means-tested, as it pays out to those who are found to lack sufficient funds to cater for their particular needs. The provision of social assistance seeks to impact on the living conditions and income levels of recipients. The social grant system has become less of a net devised to catch an unfortunate few in terms of temporary distress, and more of a major commitment to help a large fraction of the population over sustained periods.<sup>126</sup> The social Assistance system is administered by the South African Social Security Agency (SASSA) established by the South African Social Security Agency Act.<sup>127</sup> SASSA has as objectives to ensure the efficient and effective management, administration and payment of social assistance; to serve as an agent for the prospective administration and payment of social security; and to render services relating to such payments.<sup>128</sup> Thus the payment of the above-mentioned grants is under the auspices of SASSA. The Agency administers social assistance grants in terms of the Social Assistance Act. The Agency must also ensure the promotion and protection of the human dignity of applicants for and beneficiaries of social security; and honest, impartial, fair and equitable service delivery.<sup>129</sup>

The child support grant, is paid to primary caregivers for children till they reach the age of 18. The grant is means tested in that the applicants must satisfy the requirement of being low income earners in order to be eligible. The value of the grant currently stands at R380 per person per month.<sup>130</sup> The care dependency grant is allocated to children who have severe disability and need full time and special care and are not being cared for permanently in a state institution. It has a current monthly value of R1600 per month.<sup>131</sup> The foster care grant is allocated to children who are in need of special care and has a value of R920 per month.<sup>132</sup> Children are placed under the care of foster parents by a court order and supervised by social

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<sup>124</sup> LG Mpedi and MAT Nyenti *Employment Injury Protection in Eastern and Southern African Countries* (Stellenbosch: SUNPreSS, 2013) 117.

<sup>125</sup> Section 4 of the Social Assistance Act 13 of 2004.

<sup>126</sup> PL Pillay *The Poverty Alleviation Impetus of the Social Security System in South Africa* (Pretoria: Africa Institute of South Africa, 2007) 18.

<sup>127</sup> South African Social Security Agency (SASSA) Act 9 of 2004.

<sup>128</sup> Section 3 of the SASSA Act.

<sup>129</sup> Section 4 of the SASSA Act.

<sup>130</sup> See <http://www.gov.za/services/child-care-social-benefits/child-support-grant>.

<sup>131</sup> <http://www.gov.za/services/services-residents/parenting/child-care/care-dependency-grant>

<sup>132</sup> <http://www.gov.za/services/child-care-social-benefits/foster-child-grant>

workers.<sup>133</sup> The allocation of the grant is to reimburse foster care parents who cater for children in distress.

There were about 17.3 million social assistance beneficiaries as at 30<sup>th</sup> April 2017.<sup>134</sup> This means that the grants have an immense significance for a large number of persons. As an example, the children’s grants have played an important role in mitigating the effect of poverty on children. These grants have helped households in meeting the cost of raising children, redistribute income, influence birth rates and relieve child poverty.<sup>135</sup> The grants provide many positive effects that have transformed the lives of children.<sup>136</sup> Funds awarded may be used by household heads to ensure the availability of food security, aid parents in buying school uniforms and paying school fees. It thus supports enrolment and attendance, especially in the case of the child support grants where one of its intentions is to ensure that children attend and complete schooling.<sup>137</sup>

The grants further increase access to credit by raising an individual's creditworthiness, alleviate poverty in the household, raise women's bargaining power in the household, and possibly fund job searches and/or day care for the beneficiary, enabling the mother to work.<sup>138</sup> Therefore, having a steady income in the form of a grant or being in a household that does, may make seeking employment possible or improve its effectiveness. Grants recipients (especially child support grants) have the zeal to search for jobs, as they use the money for transportation and food to have enough strength in their job search. In this way, beneficiaries of these grants are being empowered economically. By gaining employment, they get to be more inclusive in the socio-economic aspect of society. Mothers in their twenties who receive grants (on behalf of their children) show on average a 15% increase in employment probability and a 9% increase in labour force participation.<sup>139</sup> Broad labour force participation increased by 7–14% for mothers who had a child receiving a child support grant, with the most positive impact being among mothers and household heads who did not complete their matric and mothers who lived in informal residences.<sup>140</sup>

Furthermore, the grants are aimed to cater for the wellbeing of children. However, the benefit is received by an adult who is responsible for the child’s welfare. Therefore, the grant, does not only benefit the child alone. Where the child lives in an extended family household, other

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<sup>133</sup> Van der Berg et al, efficiency and equity of social grants in South Africa. 9

<sup>134</sup> The number of recipients of the various grants are as follows: Old Age grant - 3,313,630; War Veteran’s grant – 175; Disability grant - 1,058,328; Grant in Aid – 165,192; Care Dependency grant – 145,030; Foster Child grant – 445,404; and Child Support grant - 12,101,127 (see South African Social Security Agency (SASSA) *Fact sheet: Issue No. 4 of 2017* (Pretoria: SASSA, 30 April 2017).

<sup>135</sup> *Ibid.*

<sup>136</sup> Department of Social Development/ South African Social Security Agency/ United Nations Children’s Fund *The South African Child Support Grants Impact Assessment: Evidence from a survey of children, adolescents and their households* Pretoria: Department of Social Development/ South African Social Security Agency/ United Nations Children’s Fund, 2012) 105.

<sup>137</sup> P Tanga and P Gutura *Impact of the child support grant on participation in the labour market in rural Eastern Cape* 49 Social Work/Maatskaplike Werk, vol. 1 (2013) 128.

<sup>138</sup> P Tanga and P Gutura *Impact of the child support grant on participation in the labour market in rural Eastern Cape* 49 Social Work/Maatskaplike Werk, vol. 1 (2013) 128.

<sup>139</sup> M Chititga-Mabugu, R Mabugu, I Fofana, B Abidoye and V Mbanda *Assessing the General Equilibrium Effects of Social Grants in South Africa* (Washington, International Food Policy Research Institute, 2014) 81.

<sup>140</sup> *Ibid.*, 81.

family members turn to benefit from the grant.<sup>141</sup> The receipt of grants (child support grants) prevents adolescent from engaging into risky behaviour.<sup>142</sup> Adolescents who are in household that receive the child support grants are being protected against risky behaviours like sexual intercourse, alcohol use, drug use and criminal activity, and in reducing the number of sexual partners and early pregnancy and it also goes a long way in reducing the adolescence absence from school.<sup>143</sup>

The child support grant payments, which are assigned to women, also boost early childhood development through nutritional impact received in the first three years of the child’s life.<sup>144</sup> Receiving the child support grant in early life improves height-for-age scores for children.<sup>145</sup> The children’s grants, particularly the child support grant have a positive impact on the child. Recipients of the grants are more likely to have better education, are not exposed to child labour and they also avoid getting involved in risky behaviour that would endanger their health and wellbeing. As a result, there is significant reduction in child poverty, inequality and vulnerability.<sup>146</sup>

Social grants are grants paid to individuals who are unfit to cater for themselves as a result of old age (including as war veterans) or disability. The range of social grants available in South Africa has a positive impact on poverty reduction since they contribute directly and indirectly to beneficiary households’ well-being and the ability of their members to participate in the country’s development.<sup>147</sup> Recent research has confirmed that the various social grants are well targeted at the poor and that they have a significant mitigating impact on poverty.<sup>148</sup> In total, 76 per cent of government spending on social grants accrues to the roughly 50 percent of individuals who constitute the poorest two quintiles of households.<sup>149</sup> Moreover, grants raise the income share of the poorest 40 per cent of households from 4.7 per cent of pre-transfer income to 7.8 per cent of post transfer income.<sup>150</sup>

The old age grant is available to women and men over the age of 60,<sup>151</sup> provided he or she complies with the applicable means-test. The rationale behind the old age grant is that the elderly (60 years and above) cannot or should not be expected to work; and in the absence of adequate savings or support from family members, risk falling into desperate poverty.<sup>152</sup> This

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<sup>141</sup> B Lekezwa *The Impact of Social Grant as anti-poverty Policy Instruments in South Africa: an Analysis Using Household Theory to Determine Intra-Household Allocation of Unearned Income* (Stellenbosch: University of Stellenbosch, 2011) 94.

<sup>142</sup> Department of Social Development/ South African Social Security Agency/ United Nations Children’s Fund *The South African Child Support Grants Impact Assessment: Evidence from a survey of children, adolescents and their households* Pretoria: Department of Social Development/ South African Social Security Agency/ United Nations Children’s Fund, 2012) 101.

<sup>143</sup> *Ibid*

<sup>144</sup> M Chititga-Mabugu, R Mabugu, I Fofana, B Abidoye and V Mbanda *Assessing the General Equilibrium Effects of Social Grants in South Africa* (Washington, International Food Policy Research Institute, 2014) 81.

<sup>145</sup> *Ibid*

<sup>146</sup> *Ibid*

<sup>147</sup> PT Jacobs, M Baiphethi, N Ngcobo and T Hart *The Potential of Social Grants Expenditure to Promote Local Economic Development and Job Creation* (Pretoria: Human Sciences Research Council, 2010) 41.

<sup>148</sup> S Van der Berg, FK Siebirts and B Lekzwa *Efficiency and equity of social grants in South Africa* (Stellenbosch Economic Working Papers no. 15/10 (2010) 33.

<sup>149</sup> *Ibid*

<sup>150</sup> *Ibid*

<sup>151</sup> Section 10(a)(b) of the Social Assistance Act.

<sup>152</sup> PL Pillay *The Poverty Alleviation Impetus of the Social Security System in South Africa* (Pretoria: Africa Institute of South Africa, 2007) 19.

grant is one of the largest current social security transfers in South Africa.<sup>153</sup> For those elderly persons who receive it, the grant is an important poverty alleviation means to the entire household.<sup>154</sup>

A person is eligible for a war veteran’s grant if he/she has attained the age of 60 years and owing to physical or mental disability, is unable to provide for his/her maintenance.<sup>155</sup> This grant is available to persons who fought in the two world wars; or performed naval, military or air force service during those wars or the Korean War.<sup>156</sup> This is subject to them meeting the means test requirement. The applicant must be resident in South Africa at the time of application,<sup>157</sup> must be 60 years and older.<sup>158</sup>

The disability grant is allocated to persons who have been medically diagnosed to be unfit to engage in any gainful activity. It is payable to persons between the ages of 18 to 59 who are disabled, owing to a physical or mental disability, unfit to obtain any service, employment or profession which would guarantee the means needed to enable him or her to provide for his or her maintenance.<sup>159</sup>

According to Pillay,<sup>160</sup> estimates suggest that each social pension paid to a beneficiary helps between five and six other people in a household. The old age grant enables pensioners to support their extended family, including grandchildren and unemployed adults.<sup>161</sup> The pensions are used to meet basic needs such as food, fuel, housing and household operations.<sup>162</sup> Recipients of old age grants turn to redistribute the grants they receive within the family.<sup>163</sup> This has helped family members in their working age to migrate to cities in search of jobs, if their elderly family members were receiving the old age grants.<sup>164</sup> This is more prominent among women, who left home to look for work away from the rural areas even though it was temporary employment. The old age grant assisted by providing financial support for these individuals and provided for children who were often left with the grandmother during this time.<sup>165</sup> This has led to gender empowerment, and has given women economic empowerment and economic participation. Regardless of the type of social grant, they are all noted for providing better nutrition in the households. Household that receive the

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<sup>153</sup> B Lekezwa *The Impact of Social Grant as anti-poverty Policy Instruments in South Africa: an Analysis Using Household Theory to Determine Intra-Household Allocation of Unearned Income* (Stellenbosch: University of Stellenbosch, 2011) 101.

<sup>154</sup> MP Olivier and ER Kalula “Legal framework and scope of coverage” in MP Olivier, N Smit N and ER Kalula *Social Security: A legal Analysis* (Durban: Lexis Nexis, 2003) 39.

<sup>155</sup> Section 11(a)-(b) of the SAA.

<sup>156</sup> Section 11(b)(i)-(iv) of the SAA.

<sup>157</sup> Section 5(b) of the SAA.

<sup>158</sup> Section 11(a)-(b) of the SAA.

<sup>159</sup> Section 9(a)(b) of the SAA.

<sup>160</sup> PL Pillay *The Poverty Alleviation Impetus of the Social Security System in South Africa* (Pretoria: Africa Institute of South Africa, 2007) 19.

<sup>161</sup> B Lekezwa *The Impact of Social Grant as anti-poverty Policy Instruments in South Africa: an Analysis Using Household Theory to Determine Intra-Household Allocation of Unearned Income* (Stellenbosch: University of Stellenbosch, 2011) 106.

<sup>162</sup> M Samson *The Social and Economic Impact of South Africa’s Social Security System* (Southern African Regional Poverty Network, 2004) 14.

<sup>163</sup> B Leubolt *Social Policies and redistribution in South Africa* (Geneva: International Labour Office, 2014) 12.

<sup>164</sup> *Ibid.*

<sup>165</sup> B Lekezwa *The Impact of Social Grant as anti-poverty Policy Instruments in South Africa: an Analysis Using Household Theory to Determine Intra-Household Allocation of Unearned Income* (Stellenbosch: University of Stellenbosch, 2011) 106.

abovementioned social grants, spend their income on basic needs such as food, fuel, and housing.<sup>166</sup>

The positive significant impact of the old age grant indicates that each thousand rand of annual pension receipt is associated with an increase of 1.5 percentage points in the share of household spending on all food items, and an increase nearly one percentage point in the share of spending on basic food items.<sup>167</sup> The same applies to disability grant recipients, with an increase of 2.5 percentage points in the share of household spending on all food items, and an increase of 1.3 percentage points in the share of spending on basic food items.<sup>168</sup> This indicates that in households with at least one grant recipient, fewer family members (both children and adult) go hungry. The reported decreasing hunger by family members is due to the altruistic character of the grant recipient.<sup>169</sup>

More so, social grants give an opportunity for poor households to offer their children with better education, by giving them more resources to finance education. One such grant is the old age grant which has proven to be very effective in this regard, with the old age pension transfer.<sup>170</sup> Findings show a positive and statistically significant effect of government pension transfers on school attendance rates of poor children.<sup>171</sup> The effects for poor school-age girls are particularly strong.<sup>172</sup>

## 6. Conclusions

The South African social security system was an integral part of the country’s past of inequality and irrational discrimination; and arbitrary governmental and executive action. The system was racially biased, providing social security only to a minority white population, while the majority of the population made up of blacks were more often left out of the system. Even in instances where the system was extended to everyone in the society, there was still traces of racial discrimination such as differentiated benefit amounts based on race.

At the end of apartheid, a new Constitution was adopted and a Bill of Rights entrenched to avoid a repetition of and to redress South Africa’s past injustices; and to establish a new society based on mutual respect, equality and freedoms. It is clear that South Africa envisaged the creation of a new society. The adoption of the Constitution with fundamental human rights entailed that the Constitution had to play a central role in the transformation of the society, which led to the term ‘transformative constitutionalism’.

Due to South Africa’s economic, social and political history, the achievement of equality (especially substantive equality) and social transformation are some of the objectives of transformative constitutionalism. Fundamental rights, such as the right of access to social

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<sup>166</sup> M Samson *The Social and Economic Impact of South Africa’s Social Security System* (Southern African Regional Poverty Network, 2004) 14.

<sup>167</sup> *Ibid*

<sup>168</sup> *Ibid*

<sup>169</sup> B Lekezwa *The Impact of Social Grant as anti-poverty Policy Instruments in South Africa: an Analysis Using Household Theory to Determine Intra-Household Allocation of Unearned Income* (Stellenbosch: University of Stellenbosch, 2011) 106.

<sup>170</sup> M Samson *The Social and Economic Impact of South Africa’s Social Security System* (Southern African Regional Poverty Network, 2004) 13.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid*, 14.

security, equality and human dignity are entrenched to promote such transformation since the realisation of the right of access to social security for everyone is also aimed at the achievement of (substantive) equality and social transformation through law. Realising social security is thus instrumental to the achievement of transformative constitutionalism.

Therefore, there was a need for a complete overhaul of the social security system, to dismantle the injustices of the past and to institute a social security system, based on equality, and human dignity. Thus, the introduction of the post-apartheid Constitution which was to transform among other aspect the socio-economic aspect of the society, and therefore guarantees the right of access to social security for all.

Transformative constitutionalism is a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a new society based on substantive equality. Transformation must be a social and an economic revolution because South Africa is contending with unequal and insufficient access to housing, food, water, healthcare and electricity. It further requires a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. Transformative constitutionalism includes the dismantling of the formal; explicit targeting and ultimate elimination of the (public and private) social structures that cause and reinforce inequality; the redistribution of social capital along egalitarian lines; an explicit engagement with social vulnerability in all legislative, executive and judicial action; and the empowerment of poor and otherwise historically marginalised sectors of society through proactive and context-sensitive measures that affirm human dignity.

The guarantee of the right of access to social security and it related rights have been important in the transformation of the South African society. The right of access to social security is one of the rights guaranteed by the Constitution in order to achieve its aims. As stated by the Constitutional court the right cannot be interpreted in isolation as it is interrelated, interdependent and mutually supporting; and therefore must be read together with other rights in the setting of the Constitution as a whole, and their interconnectedness needs to be taken into account in interpreting rights. The above-mentioned rights, together with the right of access to social security, have been instrumental in the transformative agenda of the South African social security system.

The right of access to social security is a fundamental right that seeks to promote the values (human dignity, freedom and equality) that underpin the objectives of the Constitution. In evaluating the values of the Constitution, a substantive approach must be taken. The Constitution guarantees everyone the right of access to social security. By everyone, it means everyone in the South African society has equal right of access to social security. The Constitution, therefore requires everyone to have the right of access to social security regardless of their race or gender. The Constitution therefore requires the socio-economic upliftment of economically and socially deprived persons for the achievement of equality. The purpose of equality is to remedy historical disadvantage and material inequalities. A substantial approach to equality permits and requires positive measures, tailored for the needs of particular individuals and groups, to address inequality and remedy disadvantage, thus creating the conditions for full and equal participation in society.

The right of access to social security is important due to the impact it has in the realisation of the foundational values entrenched in the Bill of Rights. All of these rights are interrelated,

therefore, the right of access to social security is important in the enjoyment of other socio-economic rights such as health care, housing, food and water. By guaranteeing the right of access to social security for everyone, providing them with the basic necessities in life their human dignity, freedom and equality in the society is safeguarded. The social security system is vital for those who cannot meet these basic needs for themselves or their families as it enables people to avoid destitution and affords that their basic needs are met upon stoppage or disruption of their income or their earning potential never developing. It also ensures complete protection against human damage, an adequate standard of living and protection against destitution. Social security serves to protect people from the life-threatening and degrading conditions of poverty and material insecurity. Thus, the main goal of a social security system is to reduce poverty and inequality by improving health outcomes, increasing school attendance, reducing hunger, improving dietary diversity and to serve as a safety net in the event of a livelihood shock, such as loss of a job, illness or the death of a breadwinner. Social benefits also encourage meaningful participation in the labour force, building self-reliance and reducing dependency.

The State has an obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. These indicate the imposition of multi-level obligations on the State to establish the new society envisaged by the Constitution based on substantive equality and social transformation, with both negative and positive components. The duty to ‘respect’ requires negative action, i.e. the State and other actors should not unreasonably limit or unjustly interfere with the right of access to social security. This implies that section 27(1)(c) accords every person the right not to have his or her access to social security subjected to undue and unjustified interference and/or restriction. Actions or omissions that unreasonably impair the right to participate in a social security scheme (especially a social insurance scheme which is without budgetary implications for the State) would constitute unreasonable violations of the State’s duty to respect the right of access to social security.

There is a positive duty on the State to set up legislative and institutional mechanisms where everyone can realise his or her right of access to social security. Legislative and other measures must be formulated to ensure equal and non-discriminatory access to everyone, especially the needy and vulnerable. As the Court held in relation to similar duties in section 26(2), this imposes a positive obligation upon the State “to devise a comprehensive and workable plan to meet its obligations in terms of the subsection”.

The social security system, especially its social assistance scheme through the various grants has played an important role in ameliorating the socio-economic situation of millions of South Africans. These grants have helped households in meeting the cost of raising children, redistribute income, influence birth rates and relieve child poverty. The grants provide many positive effects that have transformed the lives of children. Funds awarded may be used by household heads to ensure the availability of food security, aid parents in buying school uniforms and paying school fees. It thus supports enrolment and attendance, especially in the case of the child support grants where one of its intentions is to ensure that children attend and complete schooling.

The grants further increase access to credit by raising an individual's creditworthiness, alleviate poverty in the household, raise women's bargaining power in the household, and possibly fund job searches and/or day care for the beneficiary, enabling the mother to work. Therefore, having a steady income in the form of a grant or being in a household that does, may make seeking employment possible or improve its effectiveness. Grants recipients

(especially child support grants) have the zeal to search for jobs, as they use the money for transportation and food to have enough strength in their job search. In this way, beneficiaries of these grants are being empowered economically. By gaining employment, they get to be more inclusive in the socio-economic aspect of society.

The old age grant enables pensioners to support their extended family, including grandchildren and unemployed adults. The pensions are used to meet basic needs such as food, fuel, housing and household operations. Recipients of old age grants turn to redistribute the grants they receive within the family. This has helped family members in their working age to migrate to cities in search of jobs, if their elderly family members were receiving the old age grants. This is more prominent among women, who left home to look for work away from the rural areas even though it was temporary employment.

More so, social grants give an opportunity for poor households to offer their children with better education, by giving them more resources to finance education. One such grant is the old age grant which has proven to be very effective in this regard, with the old age pension transfer. Findings show a positive and statistically significant effect of government pension transfers on school attendance rates of poor children. The effects for poor school-age girls are particularly strong.

It is evident that the social security system in South Africa has been crucial in realising social transformation through cash transfers to the poor and most vulnerable in the society. In return it has improved their standards of living and kept children at school, thereby increasing school attendance. However, a sizeable amount of people are still left out by system. These are able-bodied people between the ages of 18 to 59, who are either unemployed, or are engaged in the informal sector that is not covered by any social security legislation. These categories of people shall live in destitution until they turn 60 when they qualify for the old age grant.

## REFERENCES

### Publications

- Albertyn C and Goldblatt B “Section 9 – the right to equality” Paper presented at the Constitutional Law of South Africa Conference, Constitution Hill (29 March 2006).
- Albertyn C and Goldblatt B *Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality* 14 South African Journal on Human Rights (1998) 248-276.
- Brand D and Heyns C (eds.) *Socio-economic rights in South Africa* (Pretoria: Pretoria University Law Press, 2005).
- Budlender G *Access to Courts* 121 South African Law Journal (2004) 339-358.
- Butt D ‘Courts and the making of public policy and the social contract revisited: Transformative constitutionalism and socio-economic rights’ (Report of a lecture by the Chief Justice of South Africa (Rhodes House, Oxford (United Kingdom), 11 June 2008).
- Chaskalson A *Human Dignity as a Foundational Value of our Constitutional Order* 16 South African Journal on Human Rights (2000) 193.

- Chaskalson M and Woolman S (eds.) *Constitutional Law of South Africa* (Cape Town: Juta, 1998).
- Chaskalson M and Woolman S *Constitutional Law of South Africa* (Cape Town: Juta, 2003).
- Cheadle MH, Davis DM and Haysom NRL *South African Constitutional Law: The Bill of Rights* (Durban: Butterworths, 2002).
- Chititga-Mabugu M, Mabugu R, Fofana I, Abidoeye B and Mbanda V *Assessing the General Equilibrium Effects of Social Grants in South Africa* (Washington, International Food Policy Research Institute, 2014).
- Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future* (Draft Consolidated Report) (Pretoria, March 2002).
- Currie I and De Waal J *The Bill of Rights Handbook* (Cape Town: Juta, 2005).
- Department of Health *Inquiry into the Various Social Security Aspects of the South African Health System: Policy Options for the Future* (Pretoria, May 2002).
- Department of Social Development *An overview of South Africa’s social security system* (Pretoria, undated).
- Department of Social Development/ South African Social Security Agency/ United Nations Children’s Fund *The South African Child Support Grants Impact Assessment: Evidence from a survey of children, adolescents and their households* Pretoria: Department of Social Development/ South African Social Security Agency/ United Nations Children’s Fund, 2012).
- Devenish GE *A Commentary on the South African Bill of Rights* (Durban: Butterworths, 1999).
- Getubig IP and Schmidt S (eds.) *Rethinking Social Security: Reaching Out to the Poor* (Kuala Lumpur: Asian and Pacific Development Centre, 1992).
- International Labour Organisation *Introduction to Social Security* (Geneva: International Labour Office, 1989).
- Jacobs PT, Baiphethi M, Ngcobo N and Hart T *The Potential of Social Grants Expenditure to Promote Local Economic Development and Job Creation. Centre for Poverty, Employment and Growth* (Pretoria: Human Sciences Research Council, March 2010).
- Klare K and Davis DM *Transformative constitutionalism and the common and customary law* 26 *South African Journal on Human Rights* (2010) 403-431.
- Klare KE *Legal Culture and Transformative Constitutionalism* 14 *South African Journal on Human Rights* (1998) 146-188.
- Langa P *Transformative constitutionalism* 17 *Stellenbosch Law Review* (2006) 351-360.
- Lekezwa B *The Impact of Social Grant as anti-poverty Policy Instruments in South Africa: an Analysis Using Household Theory to Determine Intra-Household Allocation of Unearned Income* (Stellenbosch: University of Stellenbosch, 2011).
- Leubolt B *Social Policies and redistribution in South Africa* (Geneva: International Labour Office, 2014).
- McLeod HD *Mutuality and solidarity in healthcare in South Africa* 5 *South African Actuarial Journal* (2005) 135–167.
- Mpedi LG and Nyenti M *Employment Injury Protection in Eastern and Southern African Countries* (Stellenbosch: SUNPreSS, 2016).
- O’Regan K *Introducing socio-economic rights* 1 *Economic and Social Rights Review* no. 4 (1999).
- Olivier MP and Kalula ER (eds.) *The Extension of Social Security Protection in South Africa* (Cape Town: Siber Ink, 2001).
- Olivier MP, Smit N and Kalula ER (eds.) *Social Security: A Legal Analysis* (Durban: Lexis Nexis, 2003).

- Olivier MP, Smit N, Kalula ER and Mhone GCZ (eds.) *Introduction to social security* (Durban: Lexis Nexis, 2004).
- Pieterse M *What do we mean when we talk about transformative constitutionalism?* 20 South African Public Law (2005) 155-166.
- Pillay PL *The Poverty Alleviation Impetus of the Social Security System in South Africa* (Pretoria: Africa Institute of South Africa, 2007).
- Price A and Bishop M (eds.) *A Transformative justice: Essays in Honour of Pius Langa* (Cape Town: Juta, 2015).
- Rapatsa M *Transformative Constitutionalism in South Africa: 20 Years of Democracy* 5 Mediterranean Journal of Social Sciences, no. 27 (2014) 887-895.
- Roberts J *The Hidden Epidemic Amongst Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Works Act in the Eastern Cape, South Africa* (Durban: Health Systems Trust, June 2009).
- Roux T *Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference* 2 Stellenbosch Law Review (2009) 258-285.
- South African Social Security Agency (SASSA) *Fact sheet: Issue No. 4 of 2017* (Pretoria, 30 April 2017).
- Statistics South Africa *Quarterly Labour Force Survey: Quarter 4: 2016* (Pretoria: Statistics South Africa, 2016).
- Tanga PT and Gutura P *Impact of the child support grant on participation in the labour market in rural Eastern Cape* 49 Social Work/Maatskaplike Werk, vol. 1 (2013) 128.
- United Nations *Enhancing Social Protection and Reducing Vulnerability in a Globalising World: Report of the Secretary-General* 39th session of the Commission for Social Development (New York, 13-23 February 2000).
- Van der Berg S, Siebrits K and Lekezwa B *Efficiency and equity of social grants in South Africa* (Stellenbosch Economic Working Papers no. 15/10 (2010).
- van Marle K *Transformative constitutionalism as/and critique* Stellenbosch Law Review (2009) 286-301.
- van Rensburg HCJ *et al Health care in South Africa: Structure and dynamics* (Pretoria: Academica, 1992).
- van Wyk B, Dugard J, de Villiers B and Davis D (eds.) *Rights and Constitutionalism* (Wotton-under-Edge: Clarendon Press, 1994).
- Von Maydell B “Fundamental Approaches and Concepts of Social Security” in Blanpain R *Law in Motion* (Leiden: Kluwer Law International, 1997).
- White Paper on Social Welfare (GN 1108 in GG 18166 of August 1997).
- Cases**
- Azanian People Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC).
- Brink v Kitschoff* NO 1996 6 BCLR 752 (CC).
- City of Johannesburg v Rand Properties (Pty) Ltd and Others* (2006 (3) BCLR 728 (W).
- Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).
- Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).
- Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).
- Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC).
- Khosa & others v The Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

*Mashavha v President of the RSA and Others* 2004 (12) BCLR 1243 (CC).  
*Minister of Health & others v Treatment Action Campaign & others* (2002) 10 BCLR 1033 (CC); (2002) 5 SA 713 (CC).  
*Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).  
*Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC).  
*President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).  
*Rates Action Group v City of Cape Town* (2004 (12) BCLA 1328 (C).  
*S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).  
*S v Mhlungu and Others* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC).  
*Soobramoney v Minister of Health (Kwazulu-Natal)* (1997) 12 BCLR 1696 (CC).

### **Legislation**

Compensation for Occupational Injuries and Diseases Act 130 of 1993.  
Medical Schemes Act 131 of 1998.  
Mine Health and Safety Act 26 of 1996.  
Miners’ Phthisis Act of 1911.  
Occupational Diseases in Mines and Works Act (ODMWA) 78 of 1973.  
Occupational Health and Safety Act 85 of 1993.  
Pneumoconiosis Act of 1956.  
Pneumoconiosis Compensation Act of 1962.  
Promotion of Administrative Justice Act 3 of 2000.  
Road Accident Fund Act 56 of 1996.  
Silicosis Act of 1925.  
Social Assistance Act 13 of 2004.  
Social Security (Minimum Standards) Convention 102 of 1952 (International Labour Organisation).  
South African Social Security Agency Act 9 of 2004.  
Unemployment Insurance Act 63 of 2001.  
Workmen's Compensation Act of 1914.