

# Seven / The right to social security and assistance

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## 1 Introduction

Section 27(1)(c) of the South African Constitution<sup>1</sup> provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Section 27(2) in turn requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 28(1)(c) further grants every child the right to basic social services.

In this chapter we describe and analyse these rights. In section 2, we describe the two foundational terms 'social security' and 'social assistance'. In sections 3 and 4 we provide an overview of the extent to and manner in which the right to social security and assistance is entrenched in international and regional human rights instruments. Finally, against that background, in section 5 we turn to the provisions in the South African Constitution, analysing and describing them in the light of recent jurisprudence and current policy and practice regarding social security and assistance in South Africa.

## 2 Social security, social assistance and social protection

Although the concepts of social security and social assistance are referred to in the Constitution, no clear definition of these concepts has been established in South Africa and the terms are sometimes used interchangeably with each other and with other terms such as 'social protection', 'social welfare' and 'social insurance'.<sup>2</sup>

<sup>1</sup> Constitution of the Republic of South Africa of 1996 (the Constitution).

<sup>2</sup> White Paper for Social Welfare, General Notice 1108 in *Government Gazette* 18166 of 8 August 1997 (White Paper for Social Welfare) para 45.

For purposes of this chapter, social security and social assistance can be described as two different means of promoting the ultimate goal of social protection.<sup>3</sup> The Commission of Inquiry into a Comprehensive System of Social Security for South Africa<sup>4</sup> defines social protection as follows:<sup>5</sup>

Comprehensive social protection is broader than the traditional concept of social security, and incorporates [all] *developmental strategies and programmes designed to ensure, collectively, at least a minimum living standard for all citizens*. It embraces the traditional measures of social insurance, social assistance and social services, but it goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State (our emphasis added).

*Social security* as one possible form of social protection refers to contributory schemes of social protection, in terms of which benefits for a variety of possible contingencies are 'earned' through the payment of contributions.<sup>6</sup> Social security schemes can be privately run schemes in terms of which, for instance, private employers and employees pay regular contributions to pension or provident funds, or private persons buy social insurance covering other unexpected events.<sup>7</sup> Social security schemes can also be public, in the sense that employers and employees and sometimes also the state itself contribute to a state-run scheme for social protection.<sup>8</sup>

A current South African example of a public social security scheme is the Unemployment Insurance Fund,<sup>9</sup> which pays out benefits to contributors and their dependants in the event of unemployment, illness, maternity and adoption. Employers and employees contribute on an equal basis to the Fund with practically no state contribution. Compensation for employment injuries and diseases is paid to employees and their dependants out of the Compensation Fund, to which employers contribute on the basis of industry-based risk assessments.<sup>10</sup>

<sup>3</sup> L Lamarche 'Social security as a human right' in D Brand & S Russel (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 109 120.

<sup>4</sup> The Taylor Commission (so called after its chairperson, Prof Vivienne Taylor). This Commission was appointed on the basis of a decision by the South African Cabinet and charged with developing recommendations on the establishment of a comprehensive social security system for South Africa.

<sup>5</sup> Department of Social Development *Transforming the present - Protecting the future: Report of the Commission of Inquiry into a Comprehensive System of Social Security for South Africa* (2002) 41.

<sup>6</sup> M Scheinin 'The right to social security' in A Eide *et al Economic, social and cultural rights: A textbook* (1995) 159.

<sup>7</sup> Private social security schemes are sometimes called *social insurance* schemes, to distinguish them from public social security schemes.

<sup>8</sup> White Paper for Social Welfare (n 2 above), ch 7 para 2.

<sup>9</sup> Established in terms of the Unemployment Insurance Act 30 of 1966.

<sup>10</sup> Established in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

*Social assistance* schemes as forms of social protection, on the other hand, are schemes in terms of which individuals or groups receive 'need-based assistance from public funds' without themselves ever having contributed directly to the scheme.<sup>11</sup> The current social assistance programme in South Africa covers the following contingencies: the state Old Age Pension; the Disability Grant; the Child Support Grant, Foster Child Grant and the Care Dependency Grant.<sup>12</sup> In terms of the number of beneficiaries, the state Old Age Grant, Child Support Grant and the Disability Grant are the largest social assistance programmes within the government funded social security system. These are all special needs-based social assistance grants - they are intended to benefit only especially vulnerable groups in society. An example of a social assistance scheme that is universally needs-based would be the Basic Income Grant that has been proposed by the Taylor Commission.<sup>13</sup>

Traditionally, the concept of social protection, whether in the form of social security or social assistance, is seen to refer to a specific list of benefits provided in the case of a specific variety of contingencies. The ILO Convention No (102) on Social Security (Minimum Standards) of 1952,<sup>14</sup> for instance, lists the classic branches of social protection as benefits paid in the event of sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children.<sup>15</sup> The Glossary to the White Paper on Social Welfare<sup>16</sup> lists old age, disability, child and family care, poverty relief, unemployment, ill-health, maternity, child-rearing, widowhood, disability and old age as contingencies for purposes of social protection.

<sup>11</sup> Scheinin (n 6 above) 159. Social assistance schemes are sometimes also referred to as social welfare schemes.

<sup>12</sup> See secs 2-4 of the Social Assistance Act 59 of 1992 as amended by the Welfare Laws Amendment Act 106 of 1997 and clauses 4-12 of the new Social Assistance Bill B57D-2003 as amended by the Select Committee on Social Services (first introduced in the National Assembly as a sec 76 Bill; explanatory summary of Bill published in *Government Gazette* 25340 of 8 August 2003.) The new Social Assistance Bill is aimed at consolidating legal requirements and provisions for social assistance in the Republic, and at creating uniform norms and standards, which can apply countrywide. The Bill makes provision for grants for the following categories of people: Child Support Grant, Care Dependency Grant, Foster Child Grant, Disability Grant, Older Persons' Grant, War Veteran's Grant and a Grant-in-Aid. The current system provides for exactly the same grants. The Department of Social Development, in briefing the Portfolio Committee on Social Development, indicated that it would not be making any policy shifts in the new Social Assistance Bill and that the Bill would be tabled to remove the assignment to the provinces as indicated in the memorandum.

<sup>13</sup> Department of Social Development (n 5 above) 42.

<sup>14</sup> ILO Convention (102).

<sup>15</sup> See International Labour Organisation *Introduction to social security* (1989) 3.

<sup>16</sup> n 2 above.

The concept of social protection that the Taylor Commission proposes is potentially much wider than an understanding of social protection limited to the usual list of contingencies. To limit social protection to only these traditional areas may leave insufficient room for development to provide new answers to new social problems that may arise.<sup>17</sup> Consistent with the idea in the White Paper for Social Welfare of a broader integrated, comprehensive and co-ordinated approach towards social protection, the Taylor Commission has developed 'minimum' requirements for a comprehensive social protection package. It remarks that comprehensive social protection requires a variety of mechanisms, embracing a package of social protection interventions and measures. These should include:

- measures to address 'income poverty' (provision of minimum income);
- measures to address 'capability poverty' (provision of certain basic services);
- measures to address 'asset poverty' (provision of income-generating assets); and
- measures to address 'special needs' (for example disability or child support).<sup>18</sup>

Key components of such a comprehensive social protection package are, according to the Taylor Commission, the (eventual) introduction of a Basic Income Grant; the gradual extension of the Child Support Grant, eventually to cover children under the age of 18; maintenance of the state Old Age Grant; and reform of the current Disability Grant, Foster Child Grant and Child Dependence Grant. Other elements of the proposed package, which perhaps are not traditionally seen as measures of social protection, include free health care (the Taylor Commission advocates the eventual introduction of a National Health Insurance system), free primary and secondary education, free water and sanitation (up to a certain basic level), free electricity (up to a certain basic level), access to affordable and adequate housing, access to jobs and skills training.<sup>19</sup>

For purposes of this chapter, our concept of social protection, and consequently our understanding of the form that both social security and social assistance programmes can take, accords with the Taylor Commission's broad approach. However, because it is the term that is most often used in the international arena, we will use the term 'social security' throughout as a collective term, referring to social protection in the broad sense.

<sup>17</sup> D Pieters *Introduction into the basic principles of social security* (1993) 1.

<sup>18</sup> Department of Social Development (n 5 above) 41-42.

<sup>19</sup> As above, 42-43. See also MP Olivier & L Jansen van Rensburg 'Addressing the alleviation of poverty through social welfare measures' (2002) Paper presented at the XVth World Congress of Sociology in Brisbane, Australia, 7-13 July 2002.

### 3 International law

Section 39(1)(b) of the Constitution compels a court, tribunal or forum, when interpreting the Bill of Rights,<sup>20</sup> to consider international law. In *S v Makwanyane and Another*,<sup>21</sup> the Constitutional Court held that, in the context of section 39(1)(b), the phrase 'public international law' refers both to international law that is binding on South Africa and to international law that South Africa is not bound to. In addition, the Court emphasised that both 'hard' and 'soft' international law must be considered by courts in their interpretation of the Bill of Rights.<sup>22</sup> International law of whatever kind is particularly important in the interpretation of socio-economic rights, such as the right to have access to social security and assistance, as there is a dearth of comparable jurisprudence from foreign domestic jurisdictions for our courts to draw on.<sup>23</sup> What follows is an overview of the body of international law that is most relevant to the interpretation of the right to social security and assistance in the South African Constitution.

#### 3.1 United Nations binding instruments

##### 3.1.1 *The International Covenant on Economic, Social and Cultural Rights*

On 3 October 1994 South Africa signed the United Nations' (UN) International Covenant on Economic, Social and Cultural Rights (CESCR).<sup>24</sup> However, South Africa is yet to ratify this treaty.

CESCR, in its article 9, entrenches a right to social security, recognising both the public and private components of the right. It enjoins state parties to 'recognise the right of everyone to social security, including social insurance'.<sup>25</sup> In addition to the provisions of article 9, article 11(1) requires that states guarantee an adequate standard of living to everyone.<sup>26</sup> The right to an adequate standard of living can be interpreted to mean that a state must at the very least

<sup>20</sup> ch 2 of the Constitution.

<sup>21</sup> 1995 3 SA 391 (CC).

<sup>22</sup> As above, para 35. 'Soft' international law consists of imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organisations, that are intended to serve as guidelines to states in their conduct, but which lack the status of 'law'. See J Dugard *International law. A South African perspective* (2000) 36.

<sup>23</sup> In *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 26, the Court makes the following observation: 'The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.'

<sup>24</sup> GA Res 2200A (XXI), UN GAOR Supp (No 16) 49, Doc A/6316 (1966) UNTS, entered into force 3 January 1976.

<sup>25</sup> Art 9: 'The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.'

<sup>26</sup> Art 11(1): 'The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family.'

provide social assistance and other needs-based forms of social benefits in cash or in kind to anyone without adequate resources.<sup>27</sup> Articles 10(1) and (2) can also be read to refer to social security and assistance in specific contexts. These sections recognise the family as the natural and fundamental group unit of society, worthy of the widest possible protection and assistance.<sup>28</sup> Pregnant mothers are to be afforded special protection and should be provided with paid maternity leave or leave with adequate social security benefits.<sup>29</sup>

The right to social security in article 9, and the other social protection-related rights in articles 10 and 11, like the other rights found in CESC, are qualified by article 2(1), which determines that they need be implemented only *progressively* and *to the maximum of available resources*.<sup>30</sup> The enforcement of the rights is entrusted to a reporting system, in terms of which state parties to CESC have to report on a regular basis to the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR).

The provisions dealing with social security in the Covenant are general. As a result, the Committee on ESCR has, in its interpretation of the Covenant, relied on the well-developed standard-setting and implementation procedure under the auspices of the International Labour Organisation (ILO).<sup>31</sup>

<sup>27</sup> Lamarche (n 3 above) 126-127.

<sup>28</sup> Art 10(1) states that '[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children'.

<sup>29</sup> Art 10(2): 'Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.'

<sup>30</sup> Art 2(1): 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

<sup>31</sup> Scheinin (n 6 above) 162. See also E/CN.4/2001/62/add 2: *Report of the High Commissioner for Human Rights, Addendum, Report on the workshop on the justiciability of economic, social and cultural rights, with particular reference to the draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*.

The approach of the Committee seems to be to complement the standard setting of the ILO through its interpretation of CESCR. This is evidenced by the guidelines for state reporting under the Covenant, in which the Committee requires states to provide information on social security based on all nine of the categories of benefits used in the ILO's Convention (102): medical care; sickness benefits; unemployment benefits; old age benefits; employment injury benefits; family benefits; maternity benefits; invalidity benefits; and survivors' benefits.<sup>32</sup> In the absence of a General Comment on the right to social security and assistance, the reliance of the Committee on ILO Convention (102) has been particularly important in the Committee's attempts to describe a minimum content of the right.<sup>33</sup>

Convention (102) does not provide a single definition of social security. This definition has to be construed from the various parts of the Convention, each addressing one of the nine social risks that it covers. To ratify Convention (102),<sup>34</sup> an ILO member state is obliged to comply, at the moment of ratification, with at least three of the following parts of the Convention: medical care, sickness benefits, unemployment benefits, old age benefits, worker's compensation benefits, family, invalidity, maternity and survival benefits. From amongst these parts, at least one part concerning either unemployment, old age, worker's compensation, invalidity or survival benefits must be accepted. Each part of the Convention provides for specific standards aimed at guaranteeing the benefit of social protection to certain persons described as protected classes of persons. Each part also provides for certain basic levels of benefits. In all cases, a ratifying member must comply with some general parts of the Convention, including Part XI, which provides for periodic

<sup>32</sup> Compilation of Guidelines on the Form and Content of Reports to be Submitted by State Parties to the International Human Rights Treaties E/C12/1991/1; Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by State Parties under arts 16 & 17 of the International Covenant on Economic, Social and Cultural Rights, paras 27 & 28 (CESCR Reporting Guidelines). The CESCR Reporting Guidelines were adopted by the Committee on ESCR at its 5th session in 1990. The consolidated guidelines for the initial part of the reports of state parties to be submitted under the various international human rights instruments, including the Covenant, are contained in document HRI/CORE/1 (see ch I of the present document), sent to state parties by *note verbale* G/SO 221 (1) of 26 April 1991.

<sup>33</sup> For a detailed analysis, see L Lamarche 'The right to social security as a human right guaranteed by the Covenant on Economic, Social and Cultural Rights - The time has come to think about it' in A Chapman & S Russell (eds) *Core obligations: Building a framework for economic, social and cultural rights* (2002) 82-108. Para 31 of the CESCR Reporting Guidelines provides as follows: 'Please indicate whether in your country there are any groups which do not enjoy the right to social security at all or which do so to a significantly lesser degree than the majority of the population. In particular, what is the situation of women in that respect? Please give particulars of such non-enjoyment of social security.'

(a) Please indicate what measures are regarded as necessary by your government in order to realise the right to social security for the groups mentioned above.

(b) Please explain the policy measures your government has taken, to the maximum of its available resources, to implement the right to social security for these groups. Give a calendar and time-related benchmarks for measuring your achievements in this regard.

(c) Please describe the effect of these measures on the situation of the vulnerable and disadvantaged groups in point, and report the successes, problems and shortcomings of such measures.'

<sup>34</sup> Up to now, 40 states have ratified Convention (102).

payments of social security. Since the adoption of Convention (102), all subsequent international and regional social security instruments<sup>35</sup> revolve around these three basic goals: enlarging the protected classes of persons or workers; upgrading the level and duration of benefits; and guaranteeing, except in the case of medical care, periodic payments of social security.

The history of all social security conventions adopted by the ILO shows a constant tension between member states of the organisation and the Bureau of the ILO in respect of the definition of protected classes of persons. In the process of drafting a convention, the Bureau has always tried to expand the categories of persons covered in order to reach the ultimate goal of social security conventions, which is universal coverage. Member states for their part always succeeded in limiting the prescribed categories to a percentage of waged workers or residents.<sup>36</sup>

Since the beginning of the 1990s, the ILO Social Security division has been given a mandate by the International Labor Conference to search for solutions that can include 'other workers' than 'male waged workers' in a social protection device.<sup>37</sup> This effort culminated in the latest Social Security for All Campaign, launched in June 2003. The ILO experts proposed an inclusive definition of social security that addresses principles as well as needs. The model suggests the following characteristics as forming the essentials of social security in a universal context:

- (a) the provision of benefits to households and individuals;
- (b) through public or collective arrangements;
- (c) aimed at protecting against low or declining living standards; and
- (d) arising from a number of basic risks and needs.

As in the case of other rights guaranteed by CESC, provision of the 'essential' or 'immediate' content of the right to social security cannot be delayed in the name of the progressive realisation commitment provided for in article 2 of CESC. The ILO's proposal for immediate access to protection against basic social risks for all encompasses the immediate obligation of states according to CESC. Although the Committee on ESCR's guidelines for reporting do not express an interpretation by the Committee of the right to social security, they capture the essence of the immediate obligation of the states with respect to this right by asking state members to report on

<sup>35</sup> Except for Convention (168) on Employment Promotion and Protection against Unemployment (1988). See below, subsec 3.2.

<sup>36</sup> See eg the discussion preceding the adoption of Convention (128) about the prescribed percentage of the population to be covered for the purpose of ratifying the Convention; Report V(I), 50th session, 1966 12-13 and Report V(2) 25-27. Those reports and discussions also illustrate clearly that even at the time, states preferred a system based on prescribed categories of workers to any other as it authorised them not to consider in their calculation atypical, marginal and part-time workers. But again, this strategy does not mean that social security schemes, in order to respect Convention (102) requirements, can only be designed to benefit workers.

<sup>37</sup> *Extending social security: Policies for developing countries*, ESS Paper No 13, ILO Social Policy and Development Branch; W van Ginneken 2003 *and social security: A new consensus* (2001).

the exclusionary effects of existing national social security schemes in the case of vulnerable groups and women.

It is clear that the process by which state members report on the implementation of the right to social security guaranteed by section 9 of CESCR would benefit from a closer collaboration between the ILO and the Committee, as well as from the adoption of a General Observation by the Committee. In the meanwhile, useful guidance can be taken from the ILO work and the recent Campaign on Social Security for All.

In addition, the interdependence of sections 9 and 11 of CESCR makes it clear that no state can pretend to respect the right to social security or even the essential content of this right if the national organisation of social security produces more social exclusion and poverty than it provides security to some workers. In some cases, the extension of the covered categories of workers will be needed, as in some others, a major tax-financed effort aimed at offering to all a protection against basic social risks will be more appropriate. But in no cases can a state delay the task of urgently providing basic security to all, if it has ratified CESCR.

### **3.1.2 Convention on the Rights of the Child**

South Africa has ratified the UN Convention on the Rights of the Child (CRC).<sup>38</sup> This Convention contains a set of rights and freedoms to be enjoyed by all children. A child as defined in this Convention is any human being under the age of 18, unless a particular nation's laws set an earlier age for the attaining of majority status.<sup>39</sup> Article 23 explicitly states that every child has the right to benefit from social security, including social insurance, and that the state should take the necessary measures to achieve the full realisation of this right in accordance with national law. Social security benefits should be granted, taking into account the resources and the circumstances of the child and those responsible for the maintenance of the child.

Article 6 of the Convention places state parties under an obligation to ensure the survival and development of the child to the maximum extent possible.<sup>40</sup> Article 6 is understood by the Committee on the Rights of the Child (Committee on RC) as follows:<sup>41</sup>

<sup>38</sup> GA Res 44/25, Annex 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990. (South Africa ratified the Convention on 16 June 1995, without entering any reservations.)

<sup>39</sup> According to the South African Constitution (sec 28(3)), 'child' means a person under the age of 18 years. This is also in line with the Social Assistance Act 59 of 1992, Welfare Laws Amendment Act 106 of 1997 and new Social Assistance Bill B57D-2003 that defines child as a person under 18 years.

<sup>40</sup> (1) States Parties recognise that every child has the inherent right to life.  
(2) States Parties shall ensure to the maximum extent possible the survival and development of the child.

<sup>41</sup> CRC/C/5 entitled General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under art 44 para 1(a) of the Convention, which were adopted by the Committee on the Rights of the Child at its 22nd meeting (first session) on 15 October 1991 para 19.

Under this section States Parties are requested to provide relevant information, including the principal legislative, judicial, administrative or other measures in force; the institutional infrastructure for implementing policy in this area, particularly monitoring strategies and mechanisms; and factors and difficulties encountered and progress achieved in implementing the relevant provisions of the Convention, in respect of:

- (a) survival and development (article 6, paragraph 2);
- (b) disabled children (article 23);
- (c) health and health services (article 24);
- (d) social security and child care services and facilities (articles 26 and 18, paragraph 3);
- (e) standard of living (article 27, paragraphs 1-3).

These provisions give rise to numerous derivative social security rights, such as the right to health care necessary for survival, and a standard of living that meets the needs for food, clothing, shelter and education.<sup>42</sup>

On 25 and 26 January 2000, the Committee on RC considered South Africa's first state report under CRC and adopted concluding observations on South Africa's compliance with the indicated Convention. In the first place the Committee noted that South Africa had not yet ratified CESC. The Committee stressed that the ratification of CESC would strengthen the efforts of the state party (ie South Africa) to meet its obligations in guaranteeing the rights of all children under its jurisdiction and encouraged South Africa to reinforce its efforts to finalise the ratification of this instrument.<sup>43</sup> Secondly, the Committee also made certain observations regarding socio-economic rights of children and the failures in the current system.<sup>44</sup> In the part described as 'Subjects of concern and recommendations of the Committee', it criticised the South African government on, among others issues, the lack of co-ordination between institutions implementing CRC;<sup>45</sup> the lack of prioritisation in budgetary allocations and distributions to ensure implementation of the economic, social and cultural rights of children; inadequacies in data collection regarding children's rights (the Committee recommended that such a system should cover all children up to the age of 18 years, with specific emphasis on those who are particularly vulnerable);<sup>46</sup> insufficient measures to guarantee for all children access to education, health care and other social services (particularly for especially vulnerable children); and inadequate levels of benefit of the Child Support Grant (which the Committee recommended must be expanded to include children up to the age of 18 years who are still in school).

<sup>42</sup> Department of Social Development (n 5 above) 50; L Jansen van Rensburg 'Die beregtiging van die fundamentele reg op toegang tot sosiale sekerheid' ('The adjudication of the fundamental right to access to social security') unpublished LLD thesis, Rand Afrikaans University, 2000 45.

<sup>43</sup> Committee on the Rights of the Child *Concluding Observations* 2000 CRC/C/15/Add.122 para 11.

<sup>44</sup> n 43 above, paras 12, 15, 24, 29 & 32.

<sup>45</sup> The same point of critique was made by the South African Human Rights Commission (SAHRC) *4th Annual Economic and Social Rights Report: 2000-2002* 29-30.

<sup>46</sup> This is annually done by the SAHRC; n 45 above, 171-234.

It is clear from the report that South Africa in major respects failed to comply with the provisions of CRC. The Committee indicated these deficiencies and recommended what still needs to be done. This approach assists South Africa in addressing these problems.

The South African Law Commission,<sup>47</sup> for instance, considered these observations and recommendations and made overall proposals in the drafting of the Children's Bill: For example, while the Commission acknowledged that means testing for purposes of determining eligibility for grants is not ideal, as the costs involved in conducting the means testing divert funds away from the actual recipients, it recommended that means testing be retained for all the grants except the Child Support Grant. The Commission reasoned that, given resource limitations, all the grants and subsidies should be targeted only at the poorest of the poor to enable those children to survive.

The Commission further observed that a significant problem facing South African children at present concerned the availability of financial support for children orphaned by HIV/AIDS, and especially those living in child-headed households. Unless they are aged under seven,<sup>48</sup> and living with a primary caregiver who can apply for a Child Support Grant, or placed in formal foster care in order for the Foster Child Grant to be payable, there is no monetary support available. Further, children who are HIV positive or have AIDS themselves are not regarded as able to qualify for the Care Dependency Grant.<sup>49</sup>

The Commission therefore recommended the introduction of the following social security scheme for children:

- a child grant;
- a foster care and court-ordered kinship care grant;
- an informal kinship care grant;
- an adoption grant;
- an emergency court grant;
- a subsidy to enable children with disabilities to obtain assistive devices;
- subsidies to NGOs contracted to the state to implement programmes and projects giving effect to this Act;
- fees to NGOs, FBOs and welfare organisations who carry out services on behalf of the state; and
- a subsidy to encourage the provision of early childhood development services.

Unfortunately, the proposed social security scheme for children by the Law Commission was not included in the new Children's Bill.<sup>50</sup> This Bill (the 'reintroduced Bill') contains part of the envisaged Children's Act. The Bill that was initially submitted to parliament

<sup>47</sup> Discussion Paper 103 Project 110 *Review of the Child Care Act* (2002) 333-338.

<sup>48</sup> Since the report, government has started a three-year process of extending the grant to children under the age of 14 years. Sec 4(1) of the Social Assistance Act as amended by the Welfare Laws Amendment Act. See R 460 in Government Gazette 24630 of 31/03/2003.

<sup>49</sup> Although adults with HIV above a certain cell count are able to qualify for the Disability Grant.

(referred to as 'the consolidated Bill') dealt with the full spectrum of protection of children in both national and provincial spheres and was to be dealt with in terms of section 76 of the Constitution (functional area of concurrent national and provincial legislative competence). It was later found to be a 'mixed' Bill, including elements to be handled in terms of both section 75 (functional area of national legislative competence) and section 76 of the Constitution. Due to its mixed character, the Deputy Speaker of the National Assembly requested the Executive to split the consolidated Bill, which has now been done. The provisions of the consolidated Bill that will apply to the provincial government have been removed and, consequently, the current Bill contains only matters which have to be dealt with in terms of section 75 of the Constitution.

As soon as the current Bill is enacted, an amendment Bill containing the matters which apply to the provincial government only ('the amendment Bill') will be introduced. The amendment Bill will have to be dealt with in terms of section 76 of the Constitution. The amendment Bill will complete the current Bill by inserting the provisions which deal with service delivery and further protection of families and children. The amendment Bill will insert the following chapters in the envisaged Act: Chapter 8 introduces a provision on the compulsory reporting by certain persons of children in need of care and protection, and addresses the child protection system, the provision of child protection services, the National Child Protection Register and measures relating to the health of children. Chapter 9 makes provision for prevention and early intervention as a first layer of services provided to children and families in need of assistance. Chapter 11 deals with contribution orders. Chapter 13 deals with foster care and care by family members.<sup>51</sup>

<sup>50</sup> Children's Bill B70 of 2003 as reintroduced in the National Assembly as a sec 75 Bill; "Explanatory summary of Bill" published in *Government Gazette* 25346 of 13/08/2003.

<sup>51</sup> See "Explanatory summary of Bill" published in *Government Gazette* 25346 of 13/08/2003.

### 3.1.3 Convention on the Elimination of All Forms of Discrimination Against Women

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>52</sup> has been ratified by South Africa. Article 11 of CEDAW requires the eradication of employment-related discrimination in social security and the loss of seniority or benefits due to pregnancy or marriage.<sup>53</sup> Article 13 guarantees for women the right of equality to family benefits and insurance.<sup>54</sup> Article 14<sup>55</sup> gives rural women the right to benefit directly from social security benefits, an area in which South Africa still needs to do more than is currently being done.<sup>56</sup> To accelerate *de facto* equality between men and women,<sup>57</sup> affirmative action is permitted by article 4.

Generally, the exclusion of certain categories of employees and non-employees from social insurance legislation can be seen as an indirect form of discrimination on the basis of gender. These include domestic workers,<sup>58</sup> casuals and informal sector workers. In this

<sup>52</sup> GA Res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981. (South Africa ratified the Convention on 15 December 1995, without entering any reservations.)

<sup>53</sup> Art 11(1)(e): 'States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.' An example of where South Africa might be in contravention of art 11 is found in sec 25 of the Basic Conditions of Employment Act 75 of 1997, which mandates employers to provide four months maternity leave to women, but does not require employers to continue remunerating employees during the four months maternity leave and also does not require employers to maintain their contributions to social security schemes while an employee is on maternity leave.

<sup>54</sup> Art 13(a)-(b): 'States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular (a) the right to family benefits; (b) the right to bank loans, mortgages and other forms of financial credit.'

<sup>55</sup> Art 14(2)(c): 'States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right to benefit directly from social security programmes.'

<sup>56</sup> In the area of social assistance, rural women can apply for the Old Age Grant if they are over 60 years or for child support if they meet the requirements. However, rural women will not qualify for social insurance because they are not permanently employed and do not contribute to the Unemployment Insurance Fund, except if they are domestic workers and they are totally excluded from the Occupational Injuries and Diseases Fund.

<sup>57</sup> Art 4(2): 'Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.'

<sup>58</sup> Domestic workers have recently been included in the Unemployment Insurance Fund. A domestic worker is defined as an employee who performs domestic work in the home of his or her employer, and includes (a) a gardener; (b) a person employed by a household as a driver of a motor vehicle; and (c) a person who takes care of any person in that home, but does not include a farm worker; sec 1 of the Unemployment Insurance Contributions Act 4 of 2002 and sec 1 of the Unemployment Insurance Act 63 of 2001. However, domestic workers are still excluded from the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (sec 1).

regard, recommendations made by the CEDAW Committee are useful in the process of interpreting and applying CEDAW rights.

### **3.1.4 Convention on the Elimination of All Forms of Racial Discrimination<sup>59</sup>**

Articles 2(1)(c) and (d) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) prohibits the perpetuation of racial discrimination in policies and legislation, while article 5(e)<sup>60</sup> refers to equality in the rights to unemployment benefits, housing and social security. The exclusion of certain categories of employees and non-employees, in particular domestic workers, casuals, and informal sector workers, from social insurance legislation can, under some circumstances, be seen as indirect discrimination on the basis of race.<sup>61</sup>

<sup>59</sup> 660 UNTS 195, entered into force 4 January 1969. (South Africa signed the Convention on 3 October 1994.)

<sup>60</sup> Art 5(e): 'In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: economic, social and cultural rights, in particular: (i) the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; (ii) the right to form and join trade unions; (iii) the right to housing; (iv) the right to public health, medical care, social security and social services; (v) the right to education and training; (vi) the right to equal participation in cultural activities.'

<sup>61</sup> The limited nature of protection in terms of the South African social security system has affected the poor as well as the informally employed and structurally unemployed among them, in particular. This stems from the fact that the social insurance system, notably unemployment insurance and compensation for work injuries and diseases, does not provide coverage to those outside formal employment. Social assistance measures seldom operate to the direct advantage of the poor and the informally employed among them. Due to the targeted nature of both social services and programmes, and of the various social grants (notably the Old Age Grant, the Disability Grant and the recently introduced Child Support Grant), many if not most of the persons falling within the categories mentioned remain part of the socially excluded population (MP Olivier & L Jansen van Rensburg 'The role and influence of international human rights instruments on South African poverty law' (2001) Paper presented at a seminar titled Law and Poverty IV - Moving towards international poverty law? Oñati, Spain, 3-4 May 2001 8). Because of South African demographics, casuals, domestic workers, informal sector workers and unemployed workers are mostly black. Although on the face of it racially neutral, the exclusion of these informal workers from benefits has a disproportionate racial impact and can be seen as indirect racial discrimination. See Department of Social Development (n 5 above) 15-33.

### 3.1.5 *Treaties on the protection of refugees and stateless persons*

There are several treaties in the area of the protection of refugees. Some of these treaties deal with social security issues. These are the Convention Relating to the Status of Refugees (Refugees Convention),<sup>62</sup> the Protocol Relating to the Status of Refugees,<sup>63</sup> the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families<sup>64</sup> and the Convention Relating to the Status of Stateless Persons (Stateless Persons Convention).<sup>65</sup>

Both the Refugees Convention and the Stateless Persons Convention not only prohibit discrimination against refugees or other non-nationals on the basis of their status, but also require state parties to provide certain positive benefits to refugees on a par with nationals. An example is article 20 of the Refugees Convention that requires that where a rationing system exists for products in short supply for the population at large, refugees should be accorded the same treatment as nationals.<sup>66</sup> Under article 24 of the Refugees Convention, state parties are obliged to provide the same treatment as they provide to their own nationals in respect of social security, subject to stated limitations.<sup>67</sup> Similar provisions for the protection

<sup>62</sup> 189 UNTS 150, entered into force 22 April 1954 (South Africa acceded on 12 January 1996).

<sup>63</sup> 606 UNTS 267, entered into force 4 October 1967 (South Africa acceded on 12 January 1996).

<sup>64</sup> GA Res 45/158, Annex, 45 UN GAOR Supp (No 49A) 262, UN Doc A/45/49 (1990), entered into force 1 July 2003. Not yet signed or acceded to.

<sup>65</sup> 360 UNTS 117, entered into force 6 June 1960. Not yet signed or acceded to.

<sup>66</sup> Art 20: 'Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.'

<sup>67</sup> Art 24: '1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters; (a) in so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining; (b) social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations: (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition; (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension. 2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State. 3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question. 4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.'

of stateless persons and migrant workers and members of their families are contained in the Stateless Persons Convention<sup>68</sup> and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.<sup>69</sup>

Apart from some exceptions for foreigners with permanent residence status, non-nationals are mostly excluded from South African social security. This applies for virtually all social assistance benefits,<sup>70</sup> as well as for certain branches of social security, such as the unemployment insurance scheme.<sup>71</sup>

In *Khosa v Minister of Social Development*,<sup>72</sup> the Constitutional Court addressed the constitutionality of certain provisions of the Social Assistance Act 59 of 1992 (as amended in some instances by the Welfare Laws Amendment Act 106 of 1997) and in effect addressed the requirements to qualify for some of the grants in the permanent grant administration process in South Africa. The applicants are permanent residents. They challenged certain sections of the Social Assistance Act that reserved grants for the elderly for South African citizens and thereby excluded otherwise eligible permanent residents, and that reserved child support grants and care dependency grants for South African citizens, again excluding otherwise eligible permanent residents, and particularly the children of permanent residents.

The Constitutional Court found these provisions to be unconstitutional, emphasising the fact that permanent residents are a vulnerable group and they need special constitutional protection. Because of the urgency of the matter, the Court decided that the most appropriate order to make was the 'reading-in' of the words 'permanent resident' in the challenged legislation.<sup>73</sup> While the Old Age Grant, Child Support Grant and Care Dependency Grant were in issue in the *Khosa* and *Mahlaule* cases, a consequence of the reading-in of the words 'permanent residents' in these sections of the Social

<sup>68</sup> Arts 24(1)(b)(i) & (ii): '1. The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters: (b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations: (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition; (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.'

<sup>69</sup> Arts 27, 45 & 54.

<sup>70</sup> In view of the fact that South African citizenship is in terms of sec 3(c) of the Social Assistance Act 59 of 1992 one of the eligibility criteria for accessing almost all social assistance benefits (such as old age and disability benefits, but not the Foster Child Grant); see also sec 12(1)(b)(i) of the Aged Persons Act 81 of 1967 for a similar restriction.

<sup>71</sup> Migrants are excluded from the operation of the Unemployment Insurance Act (UIA) if they have to be repatriated at the termination of their services; see now sec 3(1)(d) of the UIA 63 of 2001. Olivier & Jansen van Rensburg (n 19 above) 12.

<sup>72</sup> *Khosa v Minister of Social Development* 2004 6 SA 505 (CC).

<sup>73</sup> n 72 above, paras 92 & 95.

Assistance Act is that the Court has granted access to any social grant in South Africa to permanent residents.

While permanent residents are now entitled to the grant,<sup>74</sup> refugees, because of the fact that they do not have the necessary documentation, are still not eligible for social assistance grants.<sup>75</sup> This despite the fact that, according to the Refugee Act,<sup>76</sup> refugees enjoy full legal protection, which includes the enjoyment of the fundamental rights set out in the Bill of Rights.<sup>77</sup>

The exclusion of migrant workers raises serious questions of a constitutional nature.<sup>78</sup> Jurisprudentially the right to equal treatment has already in the area of employment been interpreted to imply that there is no basis to distinguish between foreigners who have obtained permanent resident status and South African citizens.<sup>79</sup> Furthermore, some of the present exclusions pertaining to non-citizens may be contrary to South Africa's treaty obligations - for example, the exclusion of foreign children from certain child grants.<sup>80</sup>

From a social security point of view this does not mean that all categories of non-citizen migrants would have to be treated alike. This may affect in particular the position of non-citizens who are *illegally* in the country. However, the White Paper on International Migration<sup>81</sup> recognises that there is no constitutional basis to exclude, *in toto*, the application of the Bill of Rights owing to the status of a person while in South Africa, including illegal immigrants.<sup>82</sup>

### 3.2 International Labour Organisation instruments

Under the UN system, the International Labour Organisation has been established to focus *inter alia* on social security rights. As a specialised agency, the ILO's standards manifest through recommendations and international labour conventions which have binding effect on those state parties who ratify them, since the conventions have the status of international treaties. However, recommendations are non-binding instruments, serving the purpose of clarifying matters dealt with by the conventions, but also performing

<sup>74</sup> As above.

<sup>75</sup> SAHRC (n 45 above) 216.

<sup>76</sup> Refugee Act 130 of 1998.

<sup>77</sup> Sec 27(b) of the Refugee Act 130 of 1998.

<sup>78</sup> Sec 27(1)(c) of the 1996 Constitution grants the 'right to access to social security' (inclusive of the right to access to social assistance) to 'everyone'. This right is underpinned by the fundamental right to equality, enshrined in sec 9.

<sup>79</sup> See *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC) paras 30-31; see also *Baloro v University of Bophuthatswana* 1995 4 SA 197 (BSC).

<sup>80</sup> See art 9 of CRC, signed and ratified by South Africa; Olivier & Jansen van Rensburg (n 19 above) 12. See *Khosa* (n 72 above). The issue whether refugees must receive special protection as in the case of permanent residents was not addressed by the Constitutional Court. The Court did, however, reason that it might be reasonable to exclude citizens from other countries, visitors and illegal residents, who have only a tenuous link with the country. See para 59.

<sup>81</sup> Of 31 March 1999.

<sup>82</sup> White Paper on International Migration paras 2.2-2.4.

the important task of setting guidelines for national policy and action.<sup>83</sup>

The Social Security (Minimum Standards) Convention No 102 of 1952<sup>84</sup> is regarded as the most comprehensive standard. Not only does Convention No 102 insist on the periodicity and regularity of available cash benefits,<sup>85</sup> but it also provides for minimum standards in nine distinct branches of social security. These branches are medical care,<sup>86</sup> sickness,<sup>87</sup> unemployment,<sup>88</sup> old age,<sup>89</sup> employment injury,<sup>90</sup> family,<sup>91</sup> maternity,<sup>92</sup> invalidity,<sup>93</sup> and survivors' benefits.<sup>94</sup> At least three schemes from the above categories need to be established by member states to the Convention. One of these three schemes must be either an unemployment benefit, old age benefit, employment injury benefit or an invalidity or survivors' benefit. The scope of protection and benefits, including the amount thereof, is defined by the minimum standard provided by the Convention.

In order to provide for a higher degree of protection than Convention No 102, new instruments have been established to supplement or revise the conventions adopted before the Second World War. The aim is to improve the system gradually, dealing with the following particular branches:

- the Employment Injury Benefits Convention No 121 of 1964;<sup>95</sup>
- the Invalidity, Old-age and Survivors' Benefits Convention No 128 of 1967;<sup>96</sup>
- the Medical Care and Sickness Benefits Convention No 130 of 1969;<sup>97</sup> and
- the Maternity Protection Convention No 183 of 2000.<sup>98</sup>

Convention No 183 of June 2000 was adopted to provide for 14 weeks' maternity leave to all employed women, inclusive of those in atypical forms of dependent work. This was preceded by Convention No 102,

<sup>83</sup> Art 19 ILO Constitution.

<sup>84</sup> Not signed or ratified by South Africa.

<sup>85</sup> Sec 1(2) of the Convention 102 defines the term benefit in arts 10, 34 & 49 as either direct benefit in the form of care or indirect benefit consisting of a reimbursement of the expenses borne by the person concerned.

<sup>86</sup> Part II arts 7-12.

<sup>87</sup> Part III arts 13-18.

<sup>88</sup> Part IV arts 19-24.

<sup>89</sup> Part V arts 25-30.

<sup>90</sup> Part VI arts 31-38.

<sup>91</sup> Part VII arts 39-45.

<sup>92</sup> Part VIII arts 46-52.

<sup>93</sup> Part IX arts 53-58.

<sup>94</sup> Part X arts 59-64.

<sup>95</sup> Not ratified by South Africa.

<sup>96</sup> Not ratified by South Africa.

<sup>97</sup> Not ratified by South Africa.

<sup>98</sup> Not ratified by South Africa.

as was the right to maternity benefits, prescribed by the Maternity Protection Convention No 103 of 1952.<sup>99</sup>

The ILO has elaborated standards in accordance with the above-mentioned developments. These standards are applicable in all branches of social security, with particular relevance to migrant workers. Among these standards are:

- the Equality of Treatment (Social Security) Convention No 118 of 1962;<sup>100</sup>
- the Migration for Employment Convention (Revised) No 97 of 1949;<sup>101</sup> and
- the Migrant Workers (Supplementary Provisions) Convention No 143 of 1975.<sup>102</sup>

Equality of treatment to workers of other ratifying countries is granted by The Equality of Treatment (Social Security) Convention No 118 of 1962. This applies to all nine branches of social security, although the obligations of the Convention may be accepted as regards only one of those branches. This guarantees the payment of long-term benefits even when the worker resides abroad. This is not only available to nationals of the ratifying state, but also to nationals of any other state which has accepted the obligations of the Convention for the corresponding branch.<sup>103</sup> Children resident within the territory of one of the states having accepted the obligations of the Convention for such a branch are guaranteed access to family allowances.<sup>104</sup>

The Migration for Employment Convention (Revised) No 97 of 1949 applies to employment migrants. Various provisions are aimed at regulating conditions under which the migration of persons for employment shall take place, in such a manner that equality of treatment is ensured. Examples of such provisions are:

<sup>99</sup> Noting the need to revise the Maternity Protection Convention (Revised) 1952, to promote equality of all women in the workforce and the health and safety of the mother and child, in order to recognise the diversity in economic and social development of member states, as well as the diversity of enterprises, and the development of the protection of maternity in national law and practice the ILO decides to revise this Convention.

<sup>100</sup> Not ratified by South Africa.

<sup>101</sup> Not ratified by South Africa.

<sup>102</sup> Not ratified by South Africa.

<sup>103</sup> Art 5(1): 'In addition to the provisions of article 4, each Member which has accepted the obligations of this Convention in respect of the branch or branches of social security concerned shall guarantee both to its own nationals and to the nationals of any other Member which has accepted the obligations of the Convention in respect of the branch or branches in question, when they are resident abroad, provision of invalidity benefits, old age benefits, survivors' benefits and death grants, and employment injury pensions, subject to measures for this purpose being taken, where necessary, in accordance with article 8.'

<sup>104</sup> Art 6: 'In addition to the provisions of article 4, each Member which has accepted the obligations of this Convention in respect of family benefit shall guarantee the grant of family allowances both to its own nationals and to the nationals of any other Member which has accepted the obligations of this Convention for that branch, in respect of children who reside on the territory of any such Member, under conditions and within limits to be agreed upon by the Members concerned.'

- the information states shall make available to one another concerning migration;<sup>105</sup>
- the establishment of free assistance and information services for migrants;<sup>106</sup>
- facilities for the departure, journey and reception of migrants;<sup>107</sup>
- medical services for migrants and the members of their families;<sup>108</sup> and
- the obligation to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within their territory, treatment no less favourable than that which they apply to their own nationals in respect of certain matters.<sup>109</sup>

Recommendation No 86 supplements the Convention.

The Migrant Workers (Supplementary Provisions) Convention No 143 of 1975 obliges ratifying states to respect the basic human rights of all migrants for employment. This is accomplished by preventative and suppressive measures towards clandestine movements of migrants for employment and illegal employment of migrants. Ratifying states are also obliged to promote genuine equality of treatment in respect of

<sup>105</sup> Art 1: 'Each member of the International Labour Organisation for which this Convention is in force undertakes to make available on request to the International Labour Office and to other Members (a) information on national policies, laws and regulations relating to emigration and immigration; (b) information on special provisions concerning migration for employment and the conditions of work and livelihood of migrants for employment; (c) information concerning general agreements and special arrangements on these questions concluded by the Member.'

<sup>106</sup> Art 2: 'Each Member for which this Convention is in force undertakes to maintain, or satisfy itself that there is maintained, an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information.'

<sup>107</sup> Art 4: 'Measures shall be taken as appropriate by each Member, within its jurisdiction, to facilitate the departure, journey and reception of migrants for employment.'

<sup>108</sup> Art 5: 'Each Member for which this Convention is in force undertakes to maintain, within its jurisdiction, appropriate medical services responsible for (a) ascertaining, where necessary, both at the time of departure and on arrival, that migrants for employment and the members of their families authorised to accompany or join them are in reasonable health; (b) ensuring that migrants for employment and members of their families enjoy adequate medical attention and good hygienic conditions at the time of departure, during the journey and on arrival in the territory of destination.'

<sup>109</sup> Art 6: '1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters: (a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities (i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons; (ii) membership of trade unions and enjoyment of the benefits of collective bargaining; (iii) accommodation; (b) social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations: (i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition; (ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension; (c) employment taxes, dues or contributions payable in respect of the person employed; and (d) legal proceedings relating to the matters referred to in this Convention.'

employment and occupation, social security, trade union and cultural rights, as well as individual collective freedoms of migrants. Article 8 of Convention 143 states as follows:

(1) On condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal ...

(2) Accordingly, he shall enjoy equality of treatment with nationals ...

Article 9 further provides that:

[W]ithout prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

A distinction should be made between legal refugees, legal migrant workers and others for the purpose of underlying states' responsibility in the field of social security. This distinction is advisable for South Africa, keeping in mind that the Convention is supplemented by Recommendation No 151.

The Discrimination (Employment and Occupation) Convention No 111 of 1958 was ratified by South Africa on 5 March 1997.<sup>110</sup> This Convention requires each state party to declare and pursue a national policy designed to promote equality of opportunity and equal treatment in respect of employment and occupation.<sup>111</sup>

### 3.3 United Nations non-binding instruments

A wide range of UN non-binding instruments exists in the form of declarations, guidelines, standard minimum rules, etc - all dealing with the right to social security. Although these documents do not have legally binding effect, they serve a significant purpose in defining the obligations of states. UN Assembly Declarations can achieve the status of customary international law once they have been repeated in state practice.<sup>112</sup> Such would express the political will of a wide range of states, representative of the regions of the world,<sup>113</sup> and especially when adopted without discord.

It is widely accepted that the Universal Declaration of Human Rights<sup>114</sup> has attained the status of customary international law. Various judicial authorities have invoked its provisions, both in a domestic and legislative evolution of authoritative legal norms. The Preamble to the Universal Declaration expressly states that its

<sup>110</sup> This is the only ILO Convention with regard to social security that South Africa has ratified. South Africa ratified it on 5 March 1997.

<sup>111</sup> Art 2.

<sup>112</sup> In order for a rule to attain the status of international law, there must be consistent practice and *opinio juris* in respect of the rule.

<sup>113</sup> For more on how resolutions of the United Nations General Assembly can attain the status of customary international law, see Dugard (n 22 above) 32.

<sup>114</sup> GA Res 217A (III), UN Doc A/810 71 (1948).

purpose is to provide 'a common understanding' of the human rights and fundamental freedoms referred to in the UN Charter and to serve 'as a common standard of achievement for all peoples and all nations'. Article 22 of the Universal Declaration provides for the following:<sup>115</sup>

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

It also caters for other areas covered by the concept of social security. Specifically, it enshrines the right of everyone<sup>116</sup>

to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Mothers and children are given special recognition, as the Declaration guarantees their entitlement to 'special care and assistance', stating unambiguously that this applies to 'all children, whether born in or out of wedlock'.<sup>117</sup> Within the context of employment benefits, workers are also afforded 'the right to just and favourable remuneration ensuring for [themselves] and [their] famil[ies] an existence worthy of human dignity, and supplemented, if necessary, by other means of 'social protection'.<sup>118</sup>

For purposes of social security, other examples of soft law are the Limburg Principles of 1987<sup>119</sup> and the so-called Maastricht Guidelines of 1997.<sup>120</sup> These constitute the official commentary of the International Commission of Jurists in co-operation with other institutions. Contained in these instruments are a series of explanatory remarks on the nature, application and duties of state parties towards CESCR. The Copenhagen Declaration on Social Development and Programme of Action is yet another important

<sup>115</sup> See also Scheinin (n 6 above) 161.

<sup>116</sup> Art 25(1) Universal Declaration.

<sup>117</sup> Art 25(2) Universal Declaration.

<sup>118</sup> Art 23(3) Universal Declaration.

<sup>119</sup> The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 122-135.

<sup>120</sup> The Maastricht Guidelines on violations of the International Covenant on Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691-701.

example of soft law, adopted at the UN World Summit for Social Development in 1995<sup>121</sup> and renewed in 2000.<sup>122</sup> In the process, consensus was reached as to placing people at the centre of the concerns for sustainable development, pledged to eradicate poverty, promote full and productive employment, and foster social integration to achieve stable, safe and just societies for all.

## 4 Regional law

### 4.1 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter or Charter)<sup>123</sup> was approved by the Organisation of African Unity (OAU) in 1981 and came into force in 1986.<sup>124</sup> South Africa acceded to the Charter on 9 July 1996, following the growing trend in the international community of states towards the regional development, protection and adjudication of international human rights standards.<sup>125</sup>

The Charter does not guarantee the right to social security in a direct sense,<sup>126</sup> but reference is made indirectly to rights that are regarded as specific contingencies of social security, as illustrated in articles 16, 18(1) and 18(4). Article 16 states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that state parties are obliged to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.<sup>127</sup> Article 18(1) places a duty on state parties to protect the family as the natural unit and basis of society and to protect the physical health and morals of the family. Article 18(4) recognises the right of the aged

<sup>121</sup> 1995 UN Doc A/Conf.166/9 (1995).

<sup>122</sup> 2000 UN Doc A/55/L.40 adopted at the 55th session of the General Assembly of the United Nations Agenda Item 37 titled 'The Implementation of the Outcome of the World Summit for Social Development and of the Special Assembly in this regard'. South Africa was present at this session.

<sup>123</sup> 1981 OAU Doc CAB/LEG/67/3 (1990). (South Africa ratified the Convention on 7 January 2000.)

<sup>124</sup> F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa* (2000) 385; CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedure' (1998) 16 *Human Rights Quarterly* 235-280.

<sup>125</sup> L Lindholt *Questioning the universality of human rights - The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique* (1997) 3-10; L Jansen van Rensburg & MP Olivier 'International and supra-national law' in MP Olivier *et al Social security: A legal analysis* (2003) 619-632.

<sup>126</sup> Lindholt (n 125 above) 217; Jansen van Rensburg & Olivier (n 125 above) 634.

<sup>127</sup> Art 16, which guarantees the right to 'the best attainable state of mental and physical health', has been considered by the African Commission in Communications 25/89, 47/90, 56/91 & 100/93, *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) 19th Session of the African Commission, April 1996. In its decision, the Commission gave a generous interpretation to the right to health, holding that it places a duty on the government of Zaire to 'provide basic services such as safe drinking water and electricity', in addition to its basic obligation to supply adequate medicine.

and disabled to special measures of protection in keeping with their physical and moral needs.<sup>128</sup>

The African continent has a unique way of addressing social rights and in particular social security rights. The duties of the family and community are of paramount importance in the social protection of the most needy. This interdependence is reflected in the African Charter in the individual's obligation to maintain his or her parents in the event of need.<sup>129</sup> There is also an obligation on individuals to pay taxes in the interest of society.<sup>130</sup> Cobbah<sup>131</sup> describes the existence of the individual within the African community as follows:<sup>132</sup> 'I am because we are, and because we are, therefore I am.' This implies that the duty to provide social protection is not only that of the state alone, but also that of the individual as a member of society.

Such an approach was also amplified by the Constitutional Court in *Grootboom*,<sup>133</sup> in particular as far as the family context is concerned. The Court remarked that the primary responsibility to provide housing to children is that of the parents. Only when it is clear that the parents do not or cannot provide, may the state be called upon to provide support - as is the case with extremely vulnerable groups of our community who cannot afford any form of housing, in particular temporary shelter.<sup>134</sup>

#### 4.2 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (African Children's Charter or Children's Charter)<sup>135</sup> addresses various contingencies of social security. Rights of the child which enjoy protection in terms of this document are the rights to survival, protection and development,<sup>136</sup> education,<sup>137</sup> health and health services<sup>138</sup> and the right not to be exploited economically.<sup>139</sup> The Children's Charter further contains a special provision regarding the social security rights of handicapped children.<sup>140</sup>

<sup>128</sup> Art 15 enshrines the right of every individual to work under equitable and satisfactory conditions, and declares that every worker shall receive equal pay for equal work. The Charter further assures the best attainable state of mental and physical health, and the obligation to take the necessary measures to protect the health of the people and to give medical attention to the sick.

<sup>129</sup> Art 29(1).

<sup>130</sup> Art 29(6).

<sup>131</sup> JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309-320.

<sup>132</sup> In the South African context this is known as the principle of *ubuntu*.

<sup>133</sup> n 23 above.

<sup>134</sup> n 23 above, para 77; Jansen van Rensburg & Olivier (n 125 above) 634.

<sup>135</sup> African Charter on the Rights and Welfare of the Child, 1990 OAU Doc CAB/LEG/24.9/49 (1990). (South Africa ratified the Convention on 7 January 2000.)

<sup>136</sup> Art 5.

<sup>137</sup> Art 11.

<sup>138</sup> Art 14.

<sup>139</sup> Art 15. See also Jansen van Rensburg & Olivier (n 125 above) 635.

<sup>140</sup> Art 13.

## 5 South African law

### 5.1 Introduction

The Constitution compels the state to ensure the 'progressive realisation' of social security. Section 27(1)(c) of the Constitution states that 'everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. Section 27(2) places an obligation on the state to '... take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [this] right'. Section 28(1)(c) further grants every child the right to social services.

This right to access to social security is backed up by a host of other social security-related fundamental rights, such as the right to have access to health care services (section 27(1)(a)); the right to sufficient food and water (section 27(1)(b)); the right to adequate housing (section 26(1)); the right to education (section 29(1)); as well as the right of children to basic nutrition, shelter, basic health care services and social services (section 28(1)(c)). There are also other fundamental rights that evidently play a significant role in the context of South African social security, such as the right to equality (section 9),<sup>141</sup> the right to respect for and protection of everyone's inherent dignity (section 10),<sup>142</sup> the right to privacy (section 14), the right to property (section 25) and the right to administrative justice (section 33).<sup>143</sup> The state is obliged to respect, protect, promote and fulfil these fundamental rights<sup>144</sup> which, in the case of most of them, implies that it must incrementally give effect to them.<sup>145</sup>

<sup>141</sup> Section 9(3) prohibits direct or indirect unfair discrimination on a number of grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. For one way in which this prohibition can exert an influence in the field of social assistance, see *Khosa* (n 72 above) paras 40 & 44. In *Khosa*, the Court recognised that all rights are interdependent, mutually related and equally important and emphasised that this specific case concerned intersecting rights which reinforce one another at the point of intersection (para 40).

<sup>142</sup> See the discussion under subsec 4.3.2 - Underpinning values and aims of social security rights.

<sup>143</sup> The right to administrative action that is lawful, reasonable and procedurally fair, including the right to written reasons for decisions adversely affecting a person's rights.

<sup>144</sup> Sec 7(2).

<sup>145</sup> See secs 7(2) & 27(2) of the Constitution.

## 5.2 The constitutional scope of the right to social security

### 5.2.1 The wording of section 27(1)(c)

Section 27(1)(c) of the South African Constitution refers to the right to *have access to* social security and not purely to the 'right to social security'. The question must therefore be asked whether the term 'access to' can be interpreted as qualifying or indeed limiting the right to social security. Initially the distinction was understood as an attempt to avoid an interpretation that sections 26(2) and 27(2) create unqualified obligations on the state to guarantee the direct provision of social goods to everyone.<sup>146</sup> In *Grootboom*,<sup>147</sup> the Court reached a different conclusion, holding that the 'right to have access to housing' can be interpreted as broader than the 'right to housing'. The right does not only require the state to provide certain basic resources. It also imposes an obligation on the part of the state to create an infrastructure and the conditions to give an individual or group access to these facilities or services.

When the judgment of the court is made applicable to social security rights, the conclusion can be reached that 'access to' means more than a pure right to.<sup>148</sup> It suggests that the state will also have to provide, by way of legislative and other measures, that everyone has access to a range of measures aimed at the realisation of social security. An example is to create the necessary infrastructure and services in rural areas for the elderly poor to enable them to collect their old age grants.<sup>149</sup>

<sup>146</sup> D Davis *et al Fundamental rights in the Constitution - Commentary and cases* (1997) 345. See also B Majola 'A response to Craig Scott. A South African perspective' (1999) 1:4 *ESR Review* 6.

<sup>147</sup> Para 35: 'The right delineated in section 26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises 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 of these, including the building of the house itself.'

<sup>148</sup> This approach of the Court places a heavier burden on the resources of the state. It implies that the state will have to create effective policies to achieve the maximum output.

<sup>149</sup> An example of where currently in South Africa a basic resource (social assistance) is being provided by the state, but where the surrounding services necessary to facilitate access are lacking or inadequate, has to do with the Old Age Pension Grant. Beneficiaries of the Old Age Pension Grant wait for an average period of two hours at payout points before receiving their grants. However, 68% of payout points have no access to water, 64% have no toilet facilities and 79% have no facilities for persons with disabilities (SAHRC (n 45 above) 29).

### 5.2.2 Underpinning values and aims of social security rights

In various sections of the Constitution, reference is made to fundamental values that underpin the objectives and aims of the Constitution.<sup>150</sup> Courts, tribunals and forums are further compelled by the Constitution, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>151</sup> In *Grootboom*, the Court held:<sup>152</sup>

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. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chapter 2. The realisation of these rights is also the 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.

The universal aim and basis for the existence of social security rights is to protect a person's right to human dignity.<sup>153</sup> Human dignity, thus, as a fundamental constitutional value<sup>154</sup> as well as a fundamental right<sup>155</sup> contained in the Bill of Rights, plays a very important role with regard to social security rights, and the equal treatment of those who are historically deprived.<sup>156</sup>

Without human dignity a person is excluded from society. A social security system aims to include an individual in society through measures or schemes implemented by the state and/or civil society to show solidarity towards such an individual.<sup>157</sup> A spin-off of such solidarity is the prevention of social exclusion - by way of social security measures a person can be placed in a position to fulfil his or her role in society with dignity.<sup>158</sup> The ILO<sup>159</sup> describes the importance of solidarity as follows:

It is not possible to have social security, worthy of the name, without a consciousness of national solidarity and perhaps - tomorrow -

<sup>150</sup> Sec 1 of the Constitution states that the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms, non-racialism and non-sexism. Sec 7(1) further 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.

<sup>151</sup> Sec 39(1)(a).

<sup>152</sup> n 23 above, para 23.

<sup>153</sup> R Ben-Israel 'Social security in the year 2000: Potentialities and problems' (1995) 16 *Comparative Labour Law Journal* 139 146; *Grootboom* (n 23 above) para 23.

<sup>154</sup> Secs 1 & 7(1) of the Constitution.

<sup>155</sup> Sec 10 of the Constitution reads as follows: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

<sup>156</sup> The South African courts have consistently stated that there is close correlation between the right to equality and the protection of a person's dignity: *Hoffmann v SA Airways* 2000 21 ILJ 2357 (CC); *Walters v Transitional Local Council of Port Elizabeth & Another* 2001 BCLR 98 (LC).

<sup>157</sup> Pieters (n 17 above) 7.

<sup>158</sup> J van Langendonck *Sociale zekerheid. Wat is dat eigenlijk?* ('Social security. What is that actually?') (1986) 1.

<sup>159</sup> International Labour Organisation *Into the twenty-first century: The development of social security* (1984) 115.

international solidarity. The effort of developing social security must therefore be accompanied by continuous effort to promote this crucial sense of shared responsibility.

For a variety of reasons, the consciousness of solidarity, which should support all our efforts towards social security, has tended to get weaker as the role of social security has widened.<sup>160</sup> In the development of a social security concept, a continuing effort must be made to promote this crucial sense of shared responsibility.<sup>161</sup> The aims of social security and social exclusion cannot be achieved if those who benefit from it do not play an active role in its development. It is essential for them to participate voluntarily in this process of change and to accept responsibility for the agencies created for them.<sup>162</sup>

*Ubuntu*<sup>163</sup> and nation building within the South African perspectives can contribute to a sense of shared responsibility. The White Paper for Social Welfare<sup>164</sup> describes the importance of *ubuntu* as follows:

The principle of caring for each other's well-being will be promoted, and a spirit of mutual support fostered. Each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through a recognition of the individual's humanity. *Ubuntu* means that people are people through other people. It also acknowledges both the rights and the responsibilities of every citizen in promoting individual and societal well-being.

On this basis, it is clear that group solidarity is not a foreign principle within South African society. The respect for and promotion of the principle of *ubuntu* can guarantee the success of a comprehensive social security system. This in turn also emphasises the importance to be given to group protection in the fight against poverty and deprivation. In fact, upon analysing the Constitutional Court judgment in *Grootboom*, and comparing that judgment with the previous judgment in *Soobramoney*,<sup>165</sup> on the enforcement of socio-economic rights in the domain of social security, one is left with the clear impression that whenever the position of historically deprived and disadvantaged groups warrants judicial intervention, the courts will more readily come to assistance than in the case of an individual claiming assistance.

<sup>160</sup> International Labour Organisation (n 15 above) 6-7.

<sup>161</sup> International Labour Organisation (n 159 above).

<sup>162</sup> J Berghman *Basic concepts of social security in Europe* (1997) 8-9.

<sup>163</sup> Langa J describes *ubuntu* in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) para 224 as follows: 'The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.'

<sup>164</sup> n 2 above, ch 2 para 18.

<sup>165</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 (CC).

It can further be argued that the value of equality and the equality clause as contained in the Bill of Rights strive to repair the historical inequalities and injustices of the past. De Vos<sup>166</sup> remarks that the rights in the Bill of Rights are interrelated and mutually supportive.<sup>167</sup> He argues that there is a relationship between social and economic rights and the right to equality and that the transformative vision of the Constitution is one that is committed to remedying socio-economic inequality. The Court thus takes historical, socio-economic and political factors into account when giving content to socio-economic rights. The same assumption can be made with regard to the right to access to social security in particular. The conclusion can be made that the state cannot realise all socio-economic rights immediately, that the courts must keep this in mind, and that the material needs of those persons who are the most vulnerable ought to enjoy priority.

This approach is visible in the recent *Khosa* case, where the Court remarked:<sup>168</sup>

There can be no doubt that the applicants are part of a *vulnerable group* in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with *intentional, statutorily sanctioned unequal treatment* of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance (our emphasis).

This exclusion is unfair, because permanent residents are cast to the margins of society and are deprived of exactly those rights, for example those recognised in section 27(1)(c), that may be essential for them to enjoy their other rights in the Constitution.<sup>169</sup>

<sup>166</sup> P de Vos '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258-276.

<sup>167</sup> See also Jansen van Rensburg (n 42 above) 55-66. Leckie makes the following observation with regard to the interdependence, interrelatedness and mutual supportiveness of civil and political rights on the one hand and socio-economic rights on the other hand: 'Equality and non-discrimination form the basis of human rights law, and although generally associated with civil and political rights, these principles have always had pertinence to economic, social and cultural rights.' S Leckie 'Another step towards indivisibility: Identifying key features of violations of economic, social and cultural rights' (1998) 20 *Human Rights Quarterly* 81 104-105.

<sup>168</sup> *Khosa* (n 72 above) para 74.

<sup>169</sup> As above, para 77. See further para 81 where the Court remarked: 'The denial of access to social assistance is total, and for as long as it endures, permanent residents unable to sustain themselves or to secure meaningful support from other sources will be relegated to the margins of society and deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution. Denying permanent residents access to social security therefore affects them in a most fundamental way.'

### 5.2.3 The duty to respect, protect, promote and fulfil

Section 7(2) states that the state has a constitutionally entrenched duty to respect, protect, promote and fulfil the rights in the Bill of Rights and consequently the right to access to social security.<sup>170</sup> On a primary level, the duty to *respect* requires negative state action and the courts will only expect the state not to interfere unduly with a person's fundamental rights.<sup>171</sup> This is known as negative enforcement by the courts. The duty prohibits the state from acting in ways that undermine the rights. This can take the following forms:

- The state arbitrarily or unreasonably deprives people of the access that they enjoy to social security, for example by ceasing payment of a beneficiary's social security benefit/grant without justification.<sup>172</sup>
- A law or policy acts as a barrier which obstructs people from gaining access to social security, or children from enjoying social services, for example, if the state made the receipt of social security benefits subject to conditions which were impossible for beneficiaries to comply with.<sup>173</sup>

<sup>170</sup> P de Vos 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67-78.

<sup>171</sup> As above, 83; *Grootboom* (n 23 above) para 34; *Minister of Health & Others v Treatment Action Campaign & Others* 2002 5 SA 72 (CC) para 46 (TAC).

<sup>172</sup> An example of this is the case of *Ngxuza & Others v The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another* 2001 2 SA 609 (E). The appellants in this case approached the Court to reinstate the disability grants they had been receiving under secs 2(a) and 3(a) of the Social Assistance Act 59 of 1992, which the province had without notice to them wrongfully terminated. The Court ordered the province to concede the claims of the applicants, with payment of arrears and interest. See also *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another v Ngxuza & Others* 2001 4 SA 1184 (SCA). Another example is the case of *Maluleke v MEC, Health and Welfare, Northern Province* 1999 4 SA 367 (T), where the province had suspended payments of social pensions to some 92 000 people. The Court found the suspension of payments to be unlawful and invalid. In two other cases, that of *Mbanga v MEC, Health and Welfare, Eastern Cape & Another* 2002 1 SA 359 (SE) and *Mahambehlala v MEC, Health and Welfare, Eastern Cape & Another* 2002 1 SA 342 (SE), the provincial government failed to process claims for social grants within a reasonable time. Mr Mbanga applied for a pension grant on 8 March 1998 and met all the requirements, while Mrs Mahambehlala applied on 7 March 2000 for a disability grant, also meeting all the requirements. The Court held in both cases that the applicants' rights were infringed by the failure of the province to act within a reasonable time. The SAHRC (n 45 above) 28 also reported that Limpopo and the Eastern Cape were provinces where grant beneficiaries were most affected by arbitrary administrative action. In Limpopo, 92 000 welfare recipients of pension and disability grants were unfairly terminated by the province's welfare department. In the Eastern Cape, applications for social assistance were often lost without any trace and pensioners waited more than a year before they could receive financial assistance from government.

<sup>173</sup> For an example, see *Khosa* (n 72 above).

- A law or policy unfairly discriminates against certain groups (whether directly or indirectly) in providing access to social security, for example, if women or any other disadvantaged group were prohibited from applying for social security.<sup>174</sup>

On a secondary level, all fundamental rights require the state to *protect* citizens from political, economic and social interference with their stated rights.<sup>175</sup> It places a positive obligation on the state not to interfere in the political, civil, economic and cultural rights of its citizens. This obligation does not require the state to distribute money or resources to individuals, but requires a framework wherein individuals can realise these rights without undue influence from the state. The duty means that the state must provide effective legislative and common law remedies to protect people against violations of their rights by other individuals or groups in society. For example, the law should effectively prevent and prohibit unfair discrimination in the private insurance industry (medical aid schemes, life and disability insurance, etc) on the basis of race, gender, HIV/AIDS status, sexual orientation, etc.<sup>176</sup> The state should also ensure that private welfare organisations provide social services to children in a fair, non-discriminatory and effective manner, particularly where they are recipients of financial awards for these purposes.

At tertiary level, section 7(2) requires that the state *promote and fulfil* everyone's rights.<sup>177</sup> The beneficiary has the right to require positive assistance, or a benefit or service from the state. The nature and scope of these obligations placed on the state will depend on the exact wording or phrasing of the fundamental right.

Section 27(2) qualifies the positive obligation of the state to realise the right to have access to social security.<sup>178</sup> The state's obligation is delimited in three ways: The obligation is (a) to take 'reasonable legislative and other measures'; (b) 'to achieve the progressive realisation' of the right; and (c) 'within [the state's] available resources'.<sup>179</sup> Almost the same formulation is found in article 2(1) of CESCR.<sup>180</sup> In *Grootboom*,<sup>181</sup> the Court interpreted the meaning of

<sup>174</sup> The exclusion of individuals (and in particular children as a vulnerable group in society) on the basis of age can be used as an example in this case. The question may be asked whether the exclusion of children from the ages of (currently) 11 to 18 from the Child Support Grant infringes on their rights to social assistance (sec 27(1)(c)), human dignity (sec 10), life (sec 11) and equality (sec 9). See also *Khosa* (n 72 above).

<sup>175</sup> De Vos (n 166 above) 83.

<sup>176</sup> In terms of the Medical Schemes Act 131 of 1998, medical schemes may, as a rule, no longer refuse membership or differentiate between members of a scheme on the basis of age and medical history. Certain core medical services have to be covered by these schemes.

<sup>177</sup> De Vos (n 170 above) 86.

<sup>178</sup> As stated in *TAC* (n 171 above) para 32 with regard to sec 27(2), referring to *Grootboom* (n 23 above) para 21. In *TAC*, the Court expressly stated that sec 27(1) is not a self-standing right independent of sec 27(2) (para 28). These two subsections are textually linked. This was also confirmed in *Khosa* (n 72 above) para 43.

<sup>179</sup> *Grootboom* (n 23 above) para 38; J de Waal *et al* *The Bill of Rights handbook* (2002) 438.

<sup>180</sup> See sec 2.2.1 above.

<sup>181</sup> *Grootboom* (n 23 above) & *TAC* (n 171 above).

these different provisions in sections 26(2) and 27(2) and the manner in which the courts are prepared to enforce socio-economic rights.<sup>182</sup>

### *Reasonable legislative and other measures*

In terms of article 2(1) of CESCR, each state has a duty to realise the rights in the Covenant to the 'maximum of their available resources'. The Committee on ESCR has said that, if the state is a developing country or is experiencing some economic difficulties, it must at least realise the minimum core obligations. The Committee on ESCR makes the following statement with regard to minimum core obligations:<sup>183</sup>

The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party.

The Committee further states that '[i]f the Covenant were to be read in such a way as to not establish such a minimum core obligation, it would largely be deprived of its *raison d'être*'. Failure by the state to provide for the basic subsistence needs of the population may be considered a *prima facie* violation of the Covenant.<sup>184</sup>

However, the Court in *Grootboom*<sup>185</sup> deviated from the international approach and stated that the real question in terms of the South African Constitution is whether the measures taken by the state to realise social rights are reasonable. Minimum core may be relevant when the Court considers reasonableness under section 27(2).<sup>186</sup> In *Grootboom*, the Court then went further and interpreted the relevant limitation by considering reasonableness. First of all, the Court stated that it would not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.<sup>187</sup> When this is applied to the right of access to social security, it means that the Court will not enquire if the current social security system is appropriate for South Africa or ask if better measures should be put in place. For example, the Court will not replace the new Child Support Grant and reinforce the old Child Maintenance Grant or create new contingencies or branches of social security that currently do not exist.

The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this

<sup>182</sup> This case raises the state's obligations under sec 26 of the Constitution, which gives everyone the right of access to adequate housing. Secs 26(2) & 27(2) have similar wording. Therefore the judgment of the Court will also be applicable to the interpretation of sec 27(2).

<sup>183</sup> General Comment No 3 *The nature of states parties' obligations (art 2, para 1 of the Covenant)* (5th session, 1990) [UN Doc E/1991/23] para 10.

<sup>184</sup> As above.

<sup>185</sup> *Grootboom* (n 23 above) para 33; *TAC* (n 171 above) para 34.

<sup>186</sup> *TAC* (n 171 above) para 34.

<sup>187</sup> *Grootboom* (n 23 above) para 41.

requirement is met.<sup>188</sup> Again, if applied to social security, this means that the Court will look at the social security system as a whole and the different measures to address the state's obligation. For example, is there a safety net for the most needy in society by way of social assistance measures? In our opinion the answer will be negative. Permanent social assistance grants in South Africa are highly categorised and only cover children from infancy to 14 years (Child Support Grant),<sup>189</sup> children in foster care (Foster Child Grant),<sup>190</sup> people with disabilities (Disability Grant),<sup>191</sup> children with disabilities (Care Dependency Grant),<sup>192</sup> the elderly (Old Age Grant).<sup>193</sup> In addition to the Old Age and Disability Grant, one can apply for a Grant-in-Aid.<sup>194</sup> This entire grant system is subject to a strict means test under the Social Assistance Act 59 of 1992.<sup>195</sup>

No provision is made by way of the permanent social assistance grant process for people without disabilities from the age of 14 to 60 or 65 (depending on gender). This implies that a large section of the population is still excluded from the social security programme which serves as the main safety net in South Africa, if one is not contributing to the Unemployment Fund or the Compensation for Occupational Sickness and Diseases Fund (Social Insurance) or to any private scheme. The only exception to the above is the temporary financial award an individual can apply for, called the Social Relief of Distress, aimed at being temporary financial material assistance, issued to people who are unable to meet their family's most basic needs.<sup>196</sup> Social Relief of Distress is defined as a means of alleviating the need of persons by means of the temporary rendering of material assistance

<sup>188</sup> As above.

<sup>189</sup> Sec 4(1) of the Social Assistance Act as amended by the Welfare Laws Amendment Act. The value of the Child Support Grant is currently R170. GN 409 in *Government Gazette* 26197 of 26/03/2004.

<sup>190</sup> Sec 4A(b) of the Social Assistance Act as amended by the Welfare Laws Amendment Act. The value of the Foster Child Grant currently amounts to R530. GN 409 in *Government Gazette* 26197 of 26/03/2004.

<sup>191</sup> Sec 3(a) of the Social Assistance Act as amended by the Welfare Laws Amendment Act. The value of grant is R740 available to women over 18 to 59 years and men over 18 to 64 years. GN 409 in *Government Gazette* 26197 of 26/03/2004.

<sup>192</sup> Sec 4B of the Social Assistance Act as amended by the Welfare Laws Amendment Act. The amount of the grant is R740 per month per child. GN 409 in *Government Gazette* 26197 of 26/03/2004.

<sup>193</sup> Sec 3(a) of the Social Assistance Act as amended by the Welfare Laws Amendment Act. The value of the grant is R740 available for women from 60 and men from 65 years. GN 409 in *Government Gazette* 26197 of 26/03/2004.

<sup>194</sup> Available for people who require full-time assistance by another person owing to his or her mental or physical disabilities who is not in care of an institution. The grant is R160. GN 409 in *Government Gazette* 26197 of 26/03/2004.

<sup>195</sup> See also <http://www.welfare.gov.za/Documents/2003/Social%20Assistance/man.htm> (accessed 30 June 2004). SAHRC (n 45 above) 27-28 reported that eligible beneficiaries of grants, eg the Child Support Grant, especially those in rural areas, found it difficult to access grants due to documentation requirements, such as identity documents and birth certificates and the minimal collaboration between the Department of Social Development and the Department of Home Affairs.

<sup>196</sup> Sec 5(2) of the Social Assistance Act 59 of 1992 as amended by sec 3 of the Welfare Laws Amendment Act 106 of 1997. Sec 5(2) of the Social Assistance Act reads as follows: 'The Director-General may, subject to the provisions of this Act, make a financial award to a person if he or she is satisfied that such person is in need of social relief of distress.'

to them. It is therefore intended for persons in such dire material need that they are unable to meet their or their family's most basic needs. It is designed to help persons and families over the crisis period.<sup>197</sup>

The Court in *Grootboom* remarked that:<sup>198</sup>

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.

From this it follows that regard must be given to historical disadvantage and particularly vulnerable groups and that they may not be neglected.<sup>199</sup> The social relief of distress award is highly questionable. It is submitted that this award does not address the material needs of those persons who are the most vulnerable and in desperate need of relief. Applying for social relief of distress is subject to a strict qualifying process, which requires, for example, that the applicant is not receiving assistance from any other organisation; that the applicant must not be awaiting permanent aid; that the applicant has not been affected by a disaster, and the area of the community in which he or she lives has not been declared a disaster area. The Department of Social Development further stresses that the rendering of Social Relief of Distress should not be seen as the sole responsibility of the state. Persons in need should, where possible, in the first instance be referred to churches, religious associations or welfare organisations.<sup>200</sup>

It could thus be argued that the more or less total exclusion of certain categories of the indigent population from the safety net of the permanent grant administration process renders the social security system of our country unreasonable. The principle behind this argument was illustrated in *Khosa*, where permanent residents were excluded from obtaining the Old Age, Child Support and Care Dependency Grants because of their non-citizenship.<sup>201</sup> The Court remarked that, when dealing with the issue of reasonableness, context is all-important. In considering whether the exclusion of permanent residents from the social security scheme is *reasonable*, the Court took the following factors into consideration: the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose. It is further necessary to have regard to the impact that this has on other intersecting rights. Where the right to social assistance is conferred by the Constitution on 'everyone' and permanent

<sup>197</sup> See <http://www.welfare.gov.za/Documents/2003/Social%20Assistance/PDF/Chap13.pdf> (accessed 30 June 2004).

<sup>198</sup> *Grootboom* (n 23 above) para 44.

<sup>199</sup> It is thus commendable that the current system provides for the Child Support Grant, the Foster Child Grant, the Disability Grant, the Care Dependency Grant, the Old Age Grant and the Grant-in-Aid because these are all people who fall into vulnerable groups.

<sup>200</sup> n 197 above.

<sup>201</sup> *Khosa* (n 72 above).

residents are denied access to this right, the equality rights entrenched in section 9 are directly implicated.<sup>202</sup>

The Court referred to the stringent means test prescribed to comply with social grants and the fact that grants are made to those in need, especially targeting the *vulnerable*. The Court further referred to the testimony of the Director-General of the Department of Social Development who described the object of the social assistance legislation as a strategy to combat poverty, to realise the objectives of the Constitution and the Reconstruction and Development Plan and to comply with South Africa's international obligations.<sup>203</sup> The Court remarked that the aim of social security, and especially social assistance, is to ensure that society values human beings by providing them with their basic needs.<sup>204</sup> The Court came to the conclusion that to exclude permanent residents from the social assistance scheme because of the fact that they lack the citizenship requirement is not reasonable as set out in section 27(2) of the Constitution.<sup>205</sup> Excluding permanent residents limits their rights and fundamentally affects their dignity and equality.<sup>206</sup>

One way in which to rectify the exclusion of a large number of indigent South Africans from the social security net referred to above, would be to pay heed to the proposals made by the Taylor Commission<sup>207</sup> for a comprehensive social protection package, including a Basic Income Grant (BIG), income-generating opportunities and free basic services to those in need.<sup>208</sup>

<sup>202</sup> n 201 above, para 49.

<sup>203</sup> n 201 above, para 51.

<sup>204</sup> n 201 above, para 52.

<sup>205</sup> n 201 above, para 83.

<sup>206</sup> n 201 above, para 84.

<sup>207</sup> Department of Social Development (n 5 above) 42-43.

<sup>208</sup> In a recent newspaper article by M Merten ('Big could bust poverty' *Mail and Guardian* (13-06-2003) 37), reference was made to a case study done by the Programme for Land and Agrarian Studies at the University of the Western Cape. According to research among malnourished youngsters admitted to hospital, only four of the 54 children who qualified for the Child Support Grant in Mount Frere in the Eastern Cape received their grants and none of the 17 caregivers eligible for foster care received the grants. A senior researcher told the parliamentary committee that is currently reviewing the proposals made by the Taylor Commission that 'the worse off you were, the less likely you were actually to receive grants ... The existing allocation of grant is arbitrary.' It was also argued that the Basic Income Grant proposed by the Committee would dramatically reduce poverty, if and as long as administrative obstacles to the efficient implementation of the grant is resolved. The government has been extremely sceptical of the Basic Income Grant. It perceives the grant as dependency (hand-out) that would be created by government. According to the research done by the Programme for Land and Agrarian Studies, 'the Basic Income Grant would dramatically reduce poverty among the bottom third of households, lifting them into a situation where economic activity or subsistence farming was possible'. The statistics indicated that the poorest third of households in Mount Frere live on R32 per person or R234 a household a month. Income would rise to R974 a household with a universal Basic Income Grant for each household.

The Court in *Grootboom* stressed further that the policies and programmes must be reasonable both in their conception and their implementation.<sup>209</sup> This implies that the social security system must reach the people. In the cases of *Mbanga v MEC, Health and Welfare, Eastern Cape and Another*<sup>210</sup> and *Mahambehala v MEC, Health and Welfare, Eastern Cape and Another*,<sup>211</sup> the provincial government failed to process claims for social grants within a reasonable time.<sup>212</sup> The Court held in both cases that the applicants' rights were infringed by the failure of the province to act within a reasonable time. This may be seen as a failure of the government to implement social security programmes.

### *Progressive realisation*

The Committee on ESCR summarises the provision relating to the requirement of 'progressive realisation' of socio-economic rights as follows:<sup>213</sup>

... the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant, which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.

The Committee further mentions that:<sup>214</sup>

Any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

The Committee further stated that the ultimate objective of the Covenant is the 'full realisation' of the rights.<sup>215</sup> The fact that the 'full realisation' is subject to the condition of progressiveness is a recognition of the fact that the full realisation of all socio-economic rights will generally not be able to be achieved in a short period of time.<sup>216</sup>

In *Grootboom*,<sup>217</sup> the Court used the interpretation of the Committee on ESCR on the meaning of the phrase 'progressive realisation'. The Court stated that 'progressive realisation' shows that it was contemplated that the right could not be realised immediately, but that the goal of the Constitution is that the basic needs of all in our society be met effectively and the requirement of progressive realisation implies that the state must take steps to achieve this goal. When this statement of the Court is applied to the

<sup>209</sup> *Grootboom* (n 23 above) para 42.

<sup>210</sup> n 172 above.

<sup>211</sup> As above.

<sup>212</sup> See in general the discussion in n 172 above.

<sup>213</sup> General Comment No 3 (n 183 above) para 9.

<sup>214</sup> As above.

<sup>215</sup> MCR Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1998) 128.

<sup>216</sup> n 215 above, 115; Maastricht Guidelines (n 120 above) guideline 8.

<sup>217</sup> *Grootboom* (n 23 above) para 45.

right to have access to social security, a twofold question arises. In the first place, what steps does the state take to keep the current social security system on track with inflation and the needs of the people receiving the benefits thereof? Secondly, what steps does the state take to broaden the current system to include a larger segment of the population and to address new and urgent contingencies?

With reference to the first question, it is encouraging to see that the state has increased the amounts of the permanent social assistance grants.<sup>218</sup> The age limit for the Child Support Grant is also currently being extended over a period from seven to 14.<sup>219</sup> Domestic workers<sup>220</sup> have also been included in the Unemployment Insurance Fund.<sup>221</sup> The inclusion of permanent residents in the social assistance system pursuant to *Khosa*<sup>222</sup> may also be seen as a positive step.

With reference to the second question, as already noted, permanent social assistance grants in South Africa are highly categorised. No provision is made by way of the permanent social assistance grant process for people without disabilities from the age of 14 to 60 or 65 (depending on gender). This implies that a large section of the population is still excluded from the social assistance programme which serves as the main safety net in South Africa, if one is not contributing to the Unemployment Fund or The Compensation for Occupational Sickness and Diseases Fund, or to any private scheme. Urgent contingencies such as financial support for children orphaned by HIV/AIDS, and especially those living in child-headed households, are not being addressed by the state.<sup>223</sup>

It can be argued that the state fails to meet the requirement of progressive realisation if it fails in the future to develop a more comprehensive and less categorised system of social security for South Africa, which would include indigent people without disabilities from the age of 15 to 60 or 65.

<sup>218</sup> However, it must be stressed that the Child Support Grant, eg, can be regarded as adequate only if it enables the primary caregiver to at least feed, clothe, shelter and acquire basic medicine for the child. It is highly questionable whether the present value of the grant is able to achieve this. The small benefit level of the grant does not appear to be linked to the needs of poor children and the cost of their support.

<sup>219</sup> Government is in the process of extending the Child Support Grant in phases to children under the age of 14 years over a period of three years. During the first phase, which lasted from 1 April 2003 to 31 March 2004, primary caregivers of children under the age of nine could apply for the grant. The second phase, from 1 April 2004 to 31 March 2005, currently allows primary caregivers of children under the age of 11 to apply. The final phase will extend from 1 April 2005 to 31 March 2006. Primary caregivers of children under the age of 14 will be able to apply for the Child Support Grant during this period. See R460 in *Government Gazette* 24630 of 31/03/2003.

<sup>220</sup> See n 61 above.

<sup>221</sup> Part of the social insurance system in South Africa.

<sup>222</sup> *Khosa* (n 72 above).

<sup>223</sup> See para 2.1.2 above. See also SAHRC (n 45 above) 28.

*Within available resources*

The Court in *Grootboom*<sup>224</sup> referred to the judgment in the case of *Soobramoney v Minister of Health (KwaZulu-Natal)*.<sup>225</sup> In *Soobramoney*, the meaning of the phrase 'available resources' was interpreted as follows:<sup>226</sup>

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.

In *Grootboom*,<sup>227</sup> the Court stressed that there is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively, but the availability of resources is an important factor in determining what is reasonable. The conclusion can thus be reached that the availability of resources is but one of the factors that have to be considered when determining whether there was an infringement of a right.<sup>228</sup> Another factor to be considered is the requirement of the Committee on ESCR that failure by the state to provide for the basic subsistence needs of the population may be considered a *prima facie* violation of the right to have access to social security.<sup>229</sup>

From the viewpoint that South Africa is currently (seemingly) in the process of ratifying CESC, it is essential that the South African government should commence identifying minimum core content obligations for unique South African circumstances.

Regarding the argument about the availability of resources, the respondents in *Khosa* argued that the inclusion of permanent residents in the social grant system would impose an impermissibly high financial burden on the state.<sup>230</sup> The respondents indicated a progressive trend in government expenditure on social security. For example, in the last three years, the spending on social grants (including administrative cost) increased from R16,1 billion to R26,2 billion and a further increase to R44,6 billion is estimated in the following three years.<sup>231</sup> The respondents further estimated that there are about 260 000 permanent residents residing in the country. The respondents failed to furnish the court with statistical evidence

<sup>224</sup> *Grootboom* (n 23 above) para 46.

<sup>225</sup> *Soobramoney* (n 165 above).

<sup>226</sup> n 225 above, para 11.

<sup>227</sup> *Grootboom* (n 23 above) para 46.

<sup>228</sup> The National Department of Social Development reported to the SAHRC that even though there was no over- or underspending in 2000/2002, the budget allocation for the reporting period was not adequate to enable the Department to implement all its programmes and projects effectively. SAHRC (n 45 above) 28.

<sup>229</sup> General Comment No 3 (n 183 above) para 10.

<sup>230</sup> *Khosa* (n 72 above) paras 19 & 60.

<sup>231</sup> n 230 above, para 60.

on the number of permanent residents that might be eligible for social grants if the citizenship requirement is removed.<sup>232</sup>

In the absence of providing clear evidence of the additional cost in providing social grants to permanent residents, the respondents made some assumptions about the groups and numbers of eligible permanent residents, and came to the conclusion that this inclusion would additionally cost the state R243 million to R672 million per annum. The Court, taking the above numbers into account, came to the conclusion that the cost of including permanent residents in the system will only be a small portion of the cost compared with the whole budget spent on social grants.<sup>233</sup>

Another reason given by the respondents for excluding permanent residents from the social security scheme was the promotion of the immigration policy of the state, which seeks to exclude persons who may become a burden on the state and thereby to encourage self-sufficiency among foreign nationals.<sup>234</sup> The Court acknowledged that limiting the cost of the social welfare budget and excluding people who may become a burden on the state is permissible as long as it is done within the boundaries set by the rights and values in the Constitution.<sup>235</sup> The Court argued that through careful immigration policies, the state could ensure that those people who are admitted will not be a burden on it. The Court noted that in this particular case it is concerned with the aged and children,<sup>236</sup> and that they are unlikely to be able to provide for themselves and that the self-sufficiency argument does not hold up in this case.<sup>237</sup>

The Court held:<sup>238</sup>

In my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies.

## 6 Conclusion

The importance of a comprehensive social security (protection) system for South Africa cannot be overemphasised. The Constitutional Court has recognised in *Grootboom*<sup>239</sup> that if the state had better social assistance programmes available for the poor, there would be less pressure on the other socio-economic rights. This includes, for example, that the state must, by means of a social assistance

<sup>232</sup> n 230 above, para 61.

<sup>233</sup> n 230 above, para 62.

<sup>234</sup> n 230 above, para 63.

<sup>235</sup> n 230 above, para 64.

<sup>236</sup> With respect to the Court, in the case of children it could be expected that their parents must be self-sufficient because it is the parents as primary care givers that are unable to support their children and as a consequence of that would apply for Child Support Grants.

<sup>237</sup> *Khosa* (n 72 above) para 65.

<sup>238</sup> n 237 above, para 82.

<sup>239</sup> *Grootboom* (n 23 above) para 30.

programme for children and parents who are unable to provide for themselves, assist them by means of, for example, child support grants.<sup>240</sup>

The idea of the Taylor Commission<sup>241</sup> of focusing on social protection as a means of implementing social security seems to be productive and in line with the evolution of international law standards. The social protection package gives to the courts and to policy makers a wider range of possible strategies aimed at promoting human dignity.<sup>242</sup>

In line with the views of the Taylor Commission, the South African Human Rights Commission also recommends the implementation of a Basic Income Grant:<sup>243</sup>

It is recommended that the state introduce the BIG or any other measure, which will enable the poorest of the poor who are excluded from social security and social assistance to escape poverty and have some form of income. This income to households will enable everyone to meet basic subsistence needs and ... to live in accordance with human dignity.

The Basic Income Grant sets out that a sum of R100 per month be paid to everyone in the country, including children who are not in receipt of another grant like the Child Support Grant. The grant would thus be universal and avoid the costs and administrative burden associated with means testing. The grant would be retrieved from the tax system from middle-income earners and higher-income earners.<sup>244</sup>

South Africa has a high rate of poverty and inequality. Most South Africans live in poverty-stricken areas and do not have access to basic social services and social assistance. Poverty is one of the most serious challenges facing South Africa and this, to a large extent, was caused by past discriminatory and racial policies. The low wages earned by those employed deprive them of a decent standard of living in the midst of rampant unemployment. It is against this background that the Basic Income Grant was proposed as a measure to reduce poverty and afford human beings a decent standard of living.

<sup>240</sup> n 239 above, para 78.

<sup>241</sup> Department of Social Development (n 5 above) 41.

<sup>242</sup> Otherwise, we trap social security in a European debate (inclusion/exclusion of a specific scheme). It is not to say that some measures are not pure social insurance schemes and should not be looked at as such. But those measures are becoming the privilege of a working elite, notwithstanding the efforts of ILO to promote inclusive standards (part-time, migrants, homework, etc).

<sup>243</sup> SAHRC (n 45 above) 229.

<sup>244</sup> It has been argued that the Basic Income Grant proposed by the Taylor Commission would dramatically reduce poverty, if and as long as administrative obstacles to the efficient implementation of the grant are resolved. Compare n 208 above.