

Towards a BIG paradigm shift: A rights based approach to poverty alleviation

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Introduction

South Africa has undergone a remarkable transformation. Many challenges have been met and many remain to be tackled. One of the greatest challenges is poverty. Approximately half the population are living in poverty, a percentage that is unacceptably high especially in light of the wealth that exists in South Africa.

The government has allocated a substantial amount of resources in attempting to address this crisis, but since 1994, job creation has consistently lagged far behind both economic growth and the rate of increase in the number of adults seeking paid work, whose ranks are constantly swollen by new entrants to the job market. As a result, unemployment has risen, and improvements in government services did less than expected to raise living standards.

Government programmes have also had their flaws and some (housing and health) have been challenged in the Constitutional Court. One of the most important things to have come out of the constitutional challenges has been the development of a “reasonableness review” for adjudicating positive claims for the provision of social services and resources.

One of the aspects of this review is that the programme must include a component that responds to the urgent needs of those in desperate situations. It is this requirement that has the most potential to reach the poorest of the poor in the short term. It is also the most urgent criteria. It is an assault on human dignity for a person to live in extreme destitution particularly in a country like South Africa, which has a wealth of resources.

South Africa is bound both by international law and its own constitution to follow a rights based approach to address the problem of poverty.

Most government departments have poverty alleviation programmes as part of their strategic plan and budget. Many are medium or long-term projects that have no immediate benefit for individual poor people. Several projects are targeted at community groups and some are complicated to access. Those short-term poverty programmes that are successful do not have the reach necessary to address the problem of poverty on a significant scale. Capacity and administrative constraints seem to plague most programmes and therefore an alternative that does not require immense capacity but has an extensive reach is required. Cash transfers are increasingly being seen as a key tool in tackling extreme poverty in sub-Saharan Africa and South Africa in particular has had great success with cash-based social transfers.¹

A universal income grant is a rights based intervention that requires relatively little administrative capacity and has enormous potential to provide assistance to those in ‘desperate need’ and to address, to some extent, destitution.

A Rights Based Approach²

One of the main characteristics of a rights based approach, and what distinguishes it from most other development approaches, is that it is normative, meaning that it is derived from a framework assigning rights and obligations to individuals, groups and states. Of central importance to a rights based approach is seeing individuals as ‘rights-holders’ and states as ‘duty-bearers’. With regards to social protection, such a perspective means that the state is

¹ Analysis of household survey data shows that the grants reduce South Africa’s poverty gap by 47%. (Samson et al 2005)

² Drawn from Piron L-H, 2004

obligated to guarantee social protection, and that citizens can claim it. Social protection is not a matter of charity or generosity, but a basic responsibility of the state.

The strength of a rights based approach is that it draws on *all* human rights. A rights based approach highlights the minimum standards that need to be respected in relation to every human being. Human rights standards also offer specific protections for vulnerable groups. These minimum standards and the focus on vulnerable groups provide a strong normative justification for social protection measures, which go well beyond social security.

One of the challenges of a rights-based approach to social protection is the translation of these standards into practice at the national and community level, so that vulnerable individuals and groups benefit from the prevention and protection they offer.

Defining Comprehensive Social Protection

Comprehensive social protection is a package of support granted to all members of society. The reason for the “package” approach is that there is an understanding that there are certain basic goods that should be available to all and should not have to be traded off against each other. For example, it is not acceptable to ask a poor parent to choose between buying food and sending their children to school although often parents are faced with this choice.

A “package” also allows a greater balance of support as the poor are guaranteed some cash support as well as a basic level of service delivery which allows social protection to better deliver on minimum acceptable living standard outcomes, especially in the event of basic service cost inflation.

The table below represents the package aimed to address poverty in South Africa.

Comprehensive Social Protection Package and Components (South African context)³

	Application	Key components
Income poverty	Universal	<ul style="list-style-type: none"> • Basic Income Grant • Child support grant • Maintained state Old Aged pension
Capability poverty	Universal / Eligibility criteria	<ul style="list-style-type: none"> • Free and adequate publicly-provided healthcare • Free primary and secondary education • Free water and sanitation (lifeline) • Free electricity (lifeline) • Accessible and affordable public transport • Access to affordable and adequate housing
Asset poverty	Universal/Eligibility criteria	<ul style="list-style-type: none"> • Access to productive and income-generating assets such as land and credit • Access to social assets such as community infrastructure
Special needs	Eligibility criteria	<ul style="list-style-type: none"> • Reformed disability grant, foster care grant, care dependency grant
Social insurance	Eligibility criteria	<ul style="list-style-type: none"> • COIDA, Road Accident Fund, health insurance, Unemployment Insurance, and retirement funds

As can be seen from the table certain components are universal while others have eligibility criteria. The Committee argued that the reason why income poverty measures needed to be universal was for the following reasons⁴:

³ Taylor Report, 2002 page 44

⁴ Ibid page 45

- Income measures are easier to roll out in the short term than more infrastructural and institutional intensive “capabilities” and “asset” poverty programmes.
- People who are in “capability” and “asset” poverty, or for that matter have “special needs”, are invariably also facing “income poverty”.
- The Constitutional Court has recognised that *if* the state were providing better social assistance to the poor there would be less pressure on other socio-economic rights:

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

In other words, the state could buy time for progressive realisation of its other socio-economic rights if it improved income transfers to the poor in the short term.

Defining Social Security

Social security encompasses interventions, carried out by the state or privately, that address risk, vulnerability and chronic poverty. It can be divided into two sub-categories:

Social insurance comprises individuals pooling resources by paying contributions to the state or a private provider so that, if they suffer a “shock” or permanent change in their circumstances, they are able to receive financial support. Examples include unemployment insurance, contributory pensions and health insurance. Social insurance is, in general, only appropriate for wealthier people although it can have an important role in preventing them falling into poverty.

Social assistance involves non-contributory transfers to those deemed eligible by society on the basis of their vulnerability or poverty. Examples include social transfers and initiatives such as fee waivers for education and health, and school meals.

Cash Transfers

There is growing evidence from developing countries that social transfers could both help growth reach the very poor and, where growth is weak, have a direct impact on poverty.⁵ Social transfers are regular and predictable grants – usually in the form of cash – that are provided to vulnerable households or individuals. They are the form of social protection that addresses income poverty (discussed above).

Historically, social transfers have played a key role in reducing poverty in developed countries but have often been overlooked in developing countries. During the past decade, however, a growing number of less poor developing countries have introduced social transfer programmes, which have begun to show encouraging results. South Africa in particular has had great success with cash-based social transfers. Analysis of household survey data shows that the grants (social transfers) reduce South Africa’s poverty gap by 47%.⁶

Social transfers can take a variety of forms and would normally be provided by the state to citizens regarded as living in conditions of long-term extreme poverty or vulnerability. Social transfers can be provided as cash, in-kind (often as food) or as vouchers. In many contexts, cash offers significant advantages. It is cheaper to deliver and is much less likely to harm local markets than, for example, food or agricultural inputs (although it may generate localised short-term inflation). A key disadvantage of vouchers, even when they are not restricted to specific purposes, is that they can often be redeemed only at certain outlets, thereby disadvantaging other market providers. Even in times of high inflation, it should still be possible to use cash as a transfer by making it index-linked.⁷

⁵ DFID, 2005

⁶ Samson et al 2005

⁷ DFID, 2005

Providing cash also demonstrates recognition that the poor are often in the best position to decide how to care for their own families. Food is insufficient for all their needs. Cash enables them to buy other essentials and invest in healthcare, education and other productive activities. The frequency with which poor people exchange food and other in-kind transfers for cash is an indication of the inadequacy of non-cash transfers.

Evidence is growing of the contribution that well-implemented social transfers can play in transforming the lives of those living in extreme poverty by, for example, reducing hunger and income poverty, improving educational and health outcomes, empowering poor people and tackling gender inequities. They can have an important role in ensuring that the benefits of growth reach the very poor as well as better enabling poor people themselves to contribute to growth.

A major challenge of any social transfer programme is ensuring that grants reach those who are meant to benefit from the programme. It is argued that the main benefit of targeting the poor is that it saves money by reducing the “inclusion error” of universal programmes. The “inclusion error” refers to transfers to people who are not poor. Effective targeting ensures that scarce resources go to those who need them most. Universal programmes provide benefits to everyone within a certain category (older people, children, people with disabilities, all citizens), while targeted programmes aim to identify the poorest within these groups. Economists often argue that the real cost of targeting is what the same resources could achieve in a universal programme. What option will reduce poverty more, social transfers targeted to the poor or transfers provided universally? The answer depends on the cost of targeting, which in turn is determined by political, social, administrative and economic factors. It also depends on how the “exclusion error” is viewed - depriving poor households of a source of social investment can trap generations in poverty, with a social cost many times the unutilised fiscal expenditure. Some social policy analysts have suggested weighting exclusion errors several times that of inclusion errors.⁸ Therefore the universal approach is particularly relevant for low-income countries with high poverty rates. A recent study of fifteen African countries found little difference between universal provision and perfect targeting.⁹ Another study of South Africa’s job creation programmes found that untargeted social transfers may be more appropriate than targeted public works projects in areas with very high poverty rates.¹⁰

The Commission for Africa has identified social transfers as a key tool in tackling extreme poverty in sub-Saharan Africa. The greater use of social transfers in developing countries worldwide is endorsed by the World Bank’s World Development Report for 2006, which recognises their potential impact on poverty and inequality as well as their contribution to promoting and distributing growth.

Social transfers are not, of course, a panacea. Significant challenges need to be overcome if they are to be successfully implemented and social transfers will not eliminate poverty by themselves. They are most effective when integrated within a wider national social protection system (such as the Comprehensive Social Protection package discussed above) that complements interventions promoting growth and providing basic social services. Social transfers can contribute to enhancing the impact and reach of these services, particularly among the very poor.

⁸ Devereux (2002), page 4, Cornia and Stewart (1993).

⁹ Kakwani, Soares and Son (2005) find that “the values of PPP indices in conditions of perfect targeting show little difference from the values of indices resulted from universal transfers. This suggests that perfect targeting may not be necessary in cases such as these 15 African countries, where poverty is extremely high.”

¹⁰ Haddad and Adato (2001), page 21.

International Obligations^{11 12}

The relevant international monitoring bodies supervising the national implementation of human rights have pointed out that State obligations arising from their ratifications of the international human rights conventions are threefold:

The obligation to **respect** requires states to avoid interfering in a way that negatively affects the realisation of a right, e.g. the right to housing is violated by arbitrary forced evictions by a state and respecting access to the right to food requires that the state not take any measures that result in preventing such access. With regards to social protection, states are obliged not to act in ways that can cause risks or enhance the vulnerability of poor people.

The obligation to **protect** means that states have to prevent violations by third parties, e.g. states have to ensure that private sector employers respect basic labour standards, or that enterprises or individuals do not deprive individuals of their access to a livelihood.

The obligation to **fulfil** incorporates both an obligation to facilitate and an obligation to provide. States have to take appropriate legislative, administrative, budgetary, judicial or other measures to ensure the full realisation of the right, the State must proactively engage in activities intended to strengthen people's access to resources and means to ensure their livelihood e.g. States have to provide essential primary health care or free and universal primary education. Social protection schemes to provide minimum social security to all would come under this obligation, although the obligation does not necessarily mean that the state has to directly provide all social protection; it can facilitate or encourage actions of third parties such as in the case of social insurance. Additionally whenever an individual or group is unable, for reasons beyond their control, to enjoy their rights by the means at their disposal, States have the obligation to fulfil (provide) that right directly.

The Nature of Human Rights¹³

Universality and inalienability: Human rights are universal and inalienable. All people everywhere in the world are entitled to them. The human person in whom they inhere cannot voluntarily give them up. Nor can others take them away from him or her. As stated in Article 1 of the Universal Declaration of Human Rights, 'All human beings are born free and equal in dignity and rights.' A rights-based approach starts from the principles of universality and equality and so every human being is equally entitled to social protection. This implies a preference for schemes that are universal over those that only benefit a specific category of people.

Indivisibility: Human rights are indivisible. Whether of a civil, cultural, economic, political or social nature, they are all inherent to the dignity of every human person. Consequently, they all have equal status as rights, and cannot be ranked, a priori, in a hierarchical order.

Inter-dependence and inter-relatedness: The realisation of one right often depends, wholly or in part, upon the realisation of others. For example, respect for the rights to adequate food and health is also a strategy to ensure better access to, and benefits from, education.

Minimum standards

The Committee that monitors the International Covenant on Economic, Social and Cultural Rights has established that states hold 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels' of each of the rights in the Covenant. These are to be met irrespective of the availability of resources in a country, which could imply reliance on international assistance in very poor countries. Minimum standards include:

- essential food stuff;
- essential primary health care;

¹¹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (International Commission of Jurists et al, 1997)

¹² From General Comment No. 12 para.. 15 of the UN Committee on Economic, Social and Cultural Rights

¹³ UN (1966) *International Covenant on Economic, Social and Cultural Rights*.

- basic shelter and housing; and
- the most basic form of education.

Social protection policies and programmes help ensure that these minimum standards are met, in order to promote livelihoods and wellbeing.¹⁴

South African Constitutional Obligations and Jurisprudence

Obligations

The Bill of Rights in the South African Constitution indicates clearly that a rights based approach is promoted in South Africa. The Constitution supports the democratic values of human dignity, equality and freedom as well as economic and social rights. ‘Everyone’ is entitled to access to adequate housing¹⁵, health care services¹⁶, sufficient food and water¹⁷ and social security rights¹⁸. The constitutional provisions related to these socio-economic rights require the State to “take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of [these rights]”¹⁹. This requirement, read with the provision on the obligation of the State to “respect, protect, promote and fulfil the rights in the Bill of rights” in section 7(2) of the Constitution is in line with the international obligations discussed above.

Jurisprudence

Reasonableness Review

The fact that the socio economic rights entrenched in the Constitution are justiciable is critical and there have been a number of cases brought to the court in respect of the rights entrenched in the Bill of Rights.

In *Grootboom*²⁰ (a case relating to the right to housing) the Court adopted a model of reasonableness review for dealing with the positive duties imposed by the socio-economic rights provisions. The central question that the Court asks is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question. In the words of the Court:

A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. 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 requirement is met.
(*Grootboom*, para. 41.)

The following five criteria for a reasonable government programme to realise socio-economic rights can be extracted from the *Grootboom* judgement:

1. The programme must be a comprehensive and coordinated one, which clearly allocates responsibilities and tasks to the different spheres of government and ensures that “the appropriate financial and human resources are available”.²¹ Although each sphere of government is responsible for implementing parts of the programme, national government has the overarching responsibility of ensuring that the programme is adequate to meet the state’s constitutional obligations.²²

¹⁴ Annex 1 provides an indicative list of such rights

¹⁵ Section 26 (1)

¹⁶ Section 27 (1) (a). In addition, the section specifically recognises that health care services includes reproductive health care services.

¹⁷ Section 27 (1) (b)

¹⁸ Section 27 (1) (c) The right of access to social security specifically includes appropriate social assistance if people are unable to support themselves and their dependants.

¹⁹ See sections 26(2), 27(2) and 29(2) of the Constitution.

²⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*)

²¹ *Grootboom* par 39.

²² *Ibid* par 40.

2. The programme “must be capable of facilitating the realization of the right” albeit on a progressive basis and within the state’s available means.²³
3. Policies and programmes must be reasonable “both in their conception and their implementation”.²⁴
4. The programme must be “balanced and flexible and make appropriate provisions for attention to housing crises and to short, medium and long-term needs” (sic). A reasonable programme cannot exclude “a significant segment of society”.²⁵
5. The programme must include a component that responds to the urgent needs of those in desperate situations. Thus a reasonable programme, even though it is statistically successful in improving access to housing, cannot “leave out of account the degree and extent of the denial of the right they endeavour to realise”.²⁶ Elsewhere in the judgment more detail is provided on what this component requires. Thus the state must “plan, budget and monitor the fulfilment of immediate needs and the management of crises”

According to the court: this last criteria must ensure that a *significant number* of desperate people in need are granted relief, though not all of them need receive it immediately.²⁷

The Court justified this latter component on the basis that we value human beings and the Constitution requires us to treat everyone with “care and concern”. Furthermore a society based on human dignity, equality and freedom strives to ensure that the basic necessities of life are provided to all.²⁸

In *Grootboom*, the otherwise rational, comprehensive housing programme was faulted for its failure “to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations”²⁹. In *TAC*³⁰ (a case dealing with the right to health), the Court held that the failure to extend the provision of the anti-retroviral drug, Nevirapine (described as “a simple, cheap and potentially lifesaving medical intervention”) to prevent mother-to-child transmission of HIV throughout public health care facilities in South Africa, was unreasonable, and hence a breach of the right of access to health care services in the Constitution.

Sandra Liebenberg argues that the model of reasonableness review gives the Court a flexible and context-sensitive tool in relation to socio-economic rights claims. On the one hand, it allows government the space to design and formulate appropriate policies to meet its socio-economic rights obligations. On the other hand, it subjects government’s choices to the requirements of rationality, inclusiveness and particularly the threshold requirement that all programmes must provide reasonable measures of relief for those whose circumstances are urgent and intolerable. Government has the opportunity to demonstrate that the measures it has adopted are reasonable in the light of its resource and capacity constraints and the overall claims on its resources. The Court has made it clear that although its orders in enforcing socio-economic rights claims may have budgetary implications, they are not “in themselves directed at rearranging budgets” (*TAC*, para. 38).³¹

The important point is that government will have to justify its policy choices when they impact detrimentally on people’s access to socio-economic rights, and these justifications will be scrutinised by the Court.

Reaching the most vulnerable – establishing a minimum level of provision

²³ *Ibid* par 41.

²⁴ *Ibid* par 42.

²⁵ *Ibid* par 43.

²⁶ *Ibid* par 44.

²⁷ *Ibid* par 68.

²⁸ *Ibid* par 44.

²⁹ *Grootboom* par 99.

³⁰ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC), 2002 (10) BCLR 1033 CC (hereafter *TAC*).

³¹ Liebenberg, S, “Basic rights claims. How responsive is ‘reasonableness review?’” *ESR Review* vol 5 no 5: 9

When assessing whether the court is going far enough in applying a rights based approach we need to ask whether the Court's jurisprudence does enough to protect vulnerable groups who face an absolute deprivation of minimum essential levels of basic socio-economic goods and services. This category of claimants is in danger of suffering irreparable harm to their lives, health and sense of human dignity if they do not receive urgent assistance. In addition, if their urgent needs are not met, there is no foundation for the progressive improvement in their living standards.

David Bilchitz³² analyses the states obligation with regard to s27. He argues that looking at the purpose behind the rights leads to the recognition that the right can be fulfilled to differing degrees. He sees each socio economic right as giving rise to two obligations: the first is to immediately realise a certain minimum level of provision, and the second is to improve the level of provision beyond this lower threshold if the right is to be fully realised. This approach acknowledges that there is only one right, but the right itself places two different obligations upon the state.³³

Bilchitz argues that this understanding of rights in the constitution helps us understand the concept of 'progressive realisation'. It is important to consider what is involved in realising a right progressively. He argues for an interpretation that recognises that there are interests that people have in socio-economic goods that are more urgent than other interests.³⁴ There are two important interests that ss 26 and 27 of the Constitution protect. The first is the minimum people need in order to survive. The second is what people need in order for them to get on with and live a good life. The concept of progressive realisation links these two interests: it recognises that what the government is required to do is to provide core services to everyone without delay that meet their survival needs and then qualitatively to increase these services so as ultimately to meet the maximal interests that the state is required to protect. Without protecting people's survival interests, all other interests and rights that they may have – whether civil, political, social or economic – become meaningless. The recognition of basic socio and economic rights for those in desperate need that must be realised without delay attempts to take account of the fact that certain interests are of greater relative importance and require a higher degree of protection than other interests. Such an interpretation avoids the creation of two self-standing rights, whilst retaining the important idea of progressive realisation and making reference to the purpose behind the protection of socio-economic rights.³⁵

Bilchitz argues that this also resonates with the approach adopted by the UN Committee on Economic, Social and Cultural Rights. Faced with interpreting the idea of progressive realisation, the UN Committee was concerned that states could use this idea to deprive the rights of all content. To avoid this consequence, they held that the notion of progressive realisation does not exempt states from immediately providing, at the minimum, for the survival needs of its population under all circumstances. The notion of progressive realisation must thus be read to include as a base-line the provision of minimum essential levels of a right which the state is then required to build upon.³⁶

Sandra Liebenberg³⁷ has argued that the justificatory elements of the reasonableness test should be tightened when dealing with situations where vulnerable groups are deprived of basic essential levels of social goods and services. A high standard of justification is warranted in this category, given the nature and urgency of the interests at stake. Members of groups who are deprived of basic socio-economic needs face severe threats to their life, health and future development. When a society has the resources to provide basic levels of socio-economic rights, it constitutes a serious denial of human dignity to neglect to

³² Bilchitz, D, "Towards a reasonable approach to the minimum core" (2003) 19 SAJHR

³³ Ibid: 11

³⁴ Ibid: 11

³⁵ Ibid: 11-12

³⁶ Ibid: 12

³⁷ Liebenberg, S, "Basic rights claims. How responsive is 'reasonableness review'?" ESR Review vol 5 no 5: 11

do so. It also undermines society's efforts to build an inclusive, caring political community. As expressed by Justice Mokgoro in the case of *Khosa*³⁸:

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society. (Para. 74, footnotes omitted.)

Liebenberg³⁹ also argues that the component of the reasonableness test requiring government programmes to provide relief for those in desperate need and living in intolerable conditions leaves many questions unanswered. In the South African context of extreme and widespread poverty, how does one define the groups that government programmes must specifically cater for, and what precise forms of relief must be provided?

Some noted concerns with respect to the *Grootboom* judgment in meeting the needs of those in 'desperate need' is that the Court failed to require that the 'intolerable conditions' of vulnerable and disadvantaged groups be alleviated as a matter of priority.

The Court did also not recognise an individual entitlement to relief, which would be of great value to litigants seeking the courts assistance in situations of severe socio-economic deprivation.

The right to social assistance

When looking at the right to social assistance Professor Liebenberg⁴⁰ asks a number of important questions with respect to the scope of the right. Firstly, the right of access to social assistance in s 27(1)(c) is restricted to those who are 'unable to support themselves and their dependants'. This raises the question as to whom the 1996 Constitution understands as being 'unable' to care for themselves and their dependants. The right must surely extend to those who cannot provide for their own or their dependant's basic needs because they are old, very young, or living with a physical or mental disability. These are the groups that are catered for under South Africa's present social assistance programmes. The critical issue is whether the right has a broader scope, extending to those who are unable to support themselves due to an inability to find employment, very low wages or insufficient access to productive assets.⁴¹

In the context of the high levels of structural unemployment and poverty in South Africa, a broad interpretation of the right is necessary, as the underlying interest that this right protects is an adequate standard of living for everyone.⁴² The capacity of millions of people to support themselves and their dependants has been severely curtailed by apartheid's legacy, including the lack of access to productive assets such as land, the education and skills deficit, and the inherent difficulties of escaping poverty traps.⁴³ In this context social assistance is a critical lifeline for poor families and assists in preserving a standard of living that is consistent with human dignity.

³⁸ *Khosa, Mahlauli and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC)

³⁹ Liebenberg, S 'South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?' (2002) *Law, Democracy and Development* 175.

⁴⁰ Liebenberg, S 'The Right To Social Assistance: The Implications Of *Grootboom* For Policy Reform In South Africa' (2001) SAJHR 232

⁴¹ *Ibid* 239

⁴² The right to social security in art 9 of the International Covenant on Economic, Social and Cultural Rights focuses on social security in the narrow sense of cash benefits for workers and their families when they are faced with certain contingencies or life-cycle events. However, a right to (non-contributory) social assistance is derived from the right to an adequate standard of living protected in art 11 of the Covenant.

⁴³ According to the Report on *Poverty and Inequality in South Africa*: 'In general, the majority of studies provide a convincing case that many of the distortions and dynamics introduced by apartheid have the potential to become self-perpetuating. As a result, they continue to reproduce poverty and perpetuate inequality'. (May 260)

The second issue to consider is the scope of the concept of 'dependants' in s 27(1)(c). Is it restricted to situations where the law recognises a formal duty of support? Households in South Africa are informal and fluid and therefore it does not seem appropriate to interpret 'dependants' narrowly. Relationships of dependence that are not currently recognised by law may exist as a survival strategy in the context of scarce resources. An important precedent was set with the introduction of the child support grant, which was made payable to the 'primary care-giver' of the eligible child. This includes relatives (for example, an aunt or grandmother), and extends even to those who are unrelated to the child provided that they take day-to-day care of the child.⁴⁴ This issue is particularly important in the context of the HIV/AIDS pandemic, where informal models of community care are evolving to deal with the growing number of AIDS orphans.⁴⁵ If social assistance is to benefit vulnerable households, it is imperative that it extend to all de facto relationships of support.

The final issue to be considered is what constitutes 'appropriate' social assistance? This adjective is clearly intended to refer to a qualitative dimension in respect of the social assistance provided. Appropriateness must be evaluated in relation to the underlying purpose of the right to social assistance. Its purpose, according to the White Paper for Social Welfare, is to ensure that everyone has a sufficient income (or in-kind benefits) to meet basic subsistence needs and to live in accordance with human dignity.⁴⁶ The level of benefits provided under the various social assistance schemes should meet a defined minimum standard that ensures that the recipient does not fall below a credible poverty line in the South African context. This is particularly difficult as South Africa does not have an official poverty line (or pair of lines identifying a poverty critical range). Everatt makes an important point: *"The failure to define poverty is not an academic matter: it directly impacts on delivery. If poverty is undefined, programmes lack focus: it is not clear why this or that service is being provided, or to whom, or where and measuring progress and impact becomes near-impossible."*⁴⁷ The kind of benefits provided should also be appropriate to the situation and needs of the particular beneficiary group. Thus, for example, child support benefits should enable a caregiver to at least feed, clothe, shelter and acquire basic medicines for the child.

There is a need for the courts to unpack the scope of the right to social assistance looking specifically at the phrase 'unable to support themselves and their dependants' as well as getting a clear definition of what "appropriate" means in order to determine exactly what must be done to reach those in 'desperate need'.

Basic Income Grant

A basic income grant is a proposal that has been researched and costed extensively. It is an intervention that has the potential to meet all the criteria for a rights based approach discussed above. It is a universal programme that meets the minimum standards established in the International Covenant on Economic, Social and Cultural Rights. It meets the criteria set out in the model of reasonableness review and most importantly because there are no administrative hurdles, it reaches those who are most vulnerable.

The Taylor Committee supported the introduction of a basic income grant (BIG). They found that **the basic income grant has the potential, more than any other possible social protection intervention, to reduce poverty and promote human development and sustainable livelihoods**. The report argued that a universal basic income grant has the potential to fortify the ability of the poor to manage risk thus contributing to the socio-economic multipliers effects related to improved household self-reliance, efficiency of social capital and societal cohesiveness. Moreover, in the view of the Committee, income support of this nature would assist the poor to access government services, thereby improving the

⁴⁴The grant is based on the underlying philosophy of 'follow-the-child'. In other words, it should reach all poor children regardless of the formal nature of the relationship with their carer. It would also, according to the Lund Committee, resolve the problem of how to define the family in a complex and multi-cultural society (Report of the Lund Committee 87-88, 91).

⁴⁵H Loening-Voysey & T Wilson *Approaches to Caring for Children Orphaned by AIDS and Other Vulnerable Children: Essential Elements For A Quality Service* (2001) report prepared for the United Nations Children's Fund (UNICEF).

⁴⁶See the *White Paper for Social Welfare*.

⁴⁷Everatt 2003: 89

effectiveness of many service delivery programmes and social policies. Also, very importantly it would provide assistance to those in 'desperate need' and address, to some extent, destitution.

The Committee has found that a lack of policy to address income poverty has been a constraining feature of South Africa's socio-economic programmes. The Committee therefore recommended that an appropriate social security concept for South Africa must prioritise the needs of people without any incomes, with insufficient incomes or who are engaged in informal activities. The Committee was of the view that by creating greater income security the poor, who are currently trapped in survivalist and low-income informal work, become empowered to risk pursuing higher-return activities that can break their cycle of poverty.

From a legal perspective Liebenberg⁴⁸ argued that social assistance programmes by their nature are well suited to ensuring that the basic subsistence needs of destitute groups are met. The existence of such programmes will also assist the state in demonstrating that it has fulfilled its obligations in respect of other socio-economic rights, for example, the right to food.⁴⁹

Government has not yet accepted the proposal to extend social assistance further by means of a BIG – on the grounds that it is unaffordable and fiscally imprudent although many studies have shown that this is not the case and the BIG is in fact affordable within the current budgetary framework.⁵⁰ There therefore remains a gap in government's strategy to support the poor. There are as yet no direct measures in place that ensure that all those in need of income are assisted by the state. We need to lobby using the arguments of a rights based approach for government to rise to the challenge of meeting its obligations to the poor.

⁴⁸ Liebenberg, S 'The Right To Social Assistance: The Implications Of *Grootboom* For Policy Reform In South Africa' (2001) SAJHR 232

⁴⁹ *Grootboom* paras 36 and 78.

⁵⁰ See the work of EPRI, le Roux, Meth and Woolard in "Breaking the Poverty Trap" Financing a Basic Income Grant in South Africa, 2004

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Appendix 1

Human rights related to poverty

The human right to live in dignity, free from want, is itself a fundamental right, and is also essential to the realization of all other human rights -- rights that are universal, indivisible, interconnected and interdependent. The right to be free from poverty includes:

The human right to an adequate standard of living.

The human right to work and receive wages that contribute to an adequate standard of living.

The human right to a healthy and safe environment.

The human right to live in adequate housing.

The human right to be free from hunger.

The human right to safe drinking water.

The human right to primary health care and medical attention in case of illness.

The human right to access to basic social services.

The human right to education.

The human right to be free of gender or racial discrimination.

The human right to participate in shaping decisions that affect oneself and one's community.

The human right for children to develop in an environment appropriate for their physical, mental, spiritual, moral and social development.

International obligations

Excerpts from International conventions and declarations

Includes excerpts from the [Universal Declaration of Human Rights](#), the [International Covenant on Economic, Social and Cultural Rights](#), the [Convention on the Elimination of All Forms of Discrimination Against Women](#), the [Convention on the Elimination of All Forms of Racial Discrimination](#), and the [Convention on the Rights of the Child](#).

"Everyone ... is entitled to the realization ... of the economic, social and cultural rights indispensable for his dignity Everyone has the right to work Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.... Everyone has the right to education...."

--[Universal Declaration of Human Rights](#), Articles 22, 23, 25, 26

"States Parties ... recognize the right to work.... to the enjoyment of just and favourable conditions of work which ensure ... fair wages and equal remuneration for work of equal value without distinction of any kind.... a decent living for themselves and their families.... the right of everyone to social security, including social insurance.... the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.... the fundamental right of everyone to be free from hunger.... to the highest attainable standard of physical and mental health.... to education...."

--[International Covenant on Economic, Social and Cultural Rights](#), Articles 6, 7, 9, 11, 12, 13

"States Parties shall ... ensure to women equal rights with men in ... education,.... the right to work.... access to health care.... bank loans ... credit.... States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure ... that they participate in and benefit from rural development and ... shall ensure to such women the right ... to have access to adequate health care facilities...; to benefit ... from

social security programmes; ... to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."

--[Convention on the Elimination of All Forms of Discrimination Against Women](#),
Articles 10, 11, 12, 13, and 14

"States Parties undertake to prohibit and to eliminate racial discrimination ... and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, ... in the enjoyment of ... the right to economic, social and cultural rights, in particular ... the right to work ... to just and favourable remuneration ... to housing ... to public health, medical care, social security and social services ... to education and training"

--[Convention on the Elimination of All Forms of Racial Discrimination](#), Article 5

"States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.... States Parties ... shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support..., particularly with regard to nutrition, clothing and housing."

--[Convention on the Rights of the Child](#), Article 27

Commitments made at various world summits

Governments' Commitments to Ensuring the Human Right to Freedom from Poverty

Includes commitments made at the [Earth Summit](#) in Rio, the [World Summit for Social Development](#) in Copenhagen, the [World Conference on Women](#) in Beijing, and the [Habitat II](#) conference in Istanbul.

"All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development...."

--[Rio Declaration](#), Principle 5

"A specific anti-poverty strategy is ... one of the basic conditions for ensuring sustainable development. An effective strategy for tackling the problems of poverty, development and environment simultaneously should begin by focusing on resources, production and people and should cover demographic issues, enhanced health care and education, the rights of women, the role of youth and of indigenous people and local communities and a democratic participation process...."

--Agenda 21, [Chapter 3](#), para. 2

"We commit ourselves to... eradicating poverty.... We will ... Formulate ... policies ... geared to ... eradicating absolute poverty by a target date ... specified by each country...; address the root causes of poverty ... food security, education, ... livelihood,... health ..., shelter...."

--[Copenhagen Declaration](#), Commitment 2

"More than one billion people in the world today, the great majority of whom are women, live in unacceptable conditions of poverty.... Women's poverty is directly related to the absence of economic opportunities and autonomy, lack of access to economic resources ... lack of access to education and support services and their minimal participation in the decision-making process...."

--[Beijing Platform for Action](#), paras. 47 and 51

"We are determined to ... eradicate the persistent and increasing burden of poverty on women by addressing the structural causes of poverty through changes in economic structures, ensuring equal access for all women ... as vital development agents, to productive resources, opportunities and public services...."

--[Beijing Platform for Action](#), para. 26

"We ... are committed to a political, economic, environmental, ethical and spiritual vision of human settlements based on the principles of equality, ... human dignity, respect and cooperation.... Violations of human rights, ... economic imbalances, poverty ... are destructive to human settlements and should ... be denounced and discouraged by all States....

Promoting equitable, socially viable and stable human settlements is inextricably linked to eradicating poverty.... Poverty has various manifestations, including homelessness and inadequate housing.... People living in poverty must be empowered through freely chosen participation in all aspects of political, economic and social life.... Key elements of a poverty eradication strategy include policies geared to reducing inequalities, increasing opportunities, improving and providing ... access to resources, employment and income...."

--[Habitat Agenda](#), paras. 25 and 115