

poverty and lack of access to basic services among children in South Africa.

In anticipation of such a case, some questions worth considering and exploring include the following:

- If the segment of society most affected by the outcome of a case involves children, under what circumstances will the Court consider it appropriate to base its judgment on a violation of s 28 as opposed to the general socio-economic rights of everyone?

Possible scenarios include challenges to the reasonableness of programmes that are directly aimed at satisfying children's basic needs, such as the Child Support Grant and the Primary School Nutrition Programme.

Another scenario could be a matter in which the Court is requested to make decisions that

**It is unclear whether the right to basic nutrition must be progressively realised through reasonable legislative and other measures, within available resources.**

would have considerable cost implications for the State, such as a challenge to the lack of social security provisioning for children aged between 7 and 18 years.

- What are the implications of the use of the words 'right to' in s 28(1)(c) in comparison with the use of the words 'right to have


access to' in sections 26(1) and 27(1)? In other words, does s 28(1)(c) impose positive obligations on the State or are such obligations limited to the general socio-economic rights?

- If the State has a positive obligation to children in terms of s 28 (1)(c), is it subject to the same qualifications as the rights for everyone in s 27?

In *Grootboom*, the Court held that s 28 must be read in context with s 26. However, it is unclear whether this interpretation means that children's right to basic nutrition must be progressively realised through reasonable legislative and other measures, within available resources. If the latter interpretation was intended by the Court, it would mean that the obligation under s 28 (1) (c) is essentially the same those as under sections 26 and 27. If this were so, s 28(1)(c) would be hollow.

- When considering a challenge based on s 28(1) (c) as opposed to s 27, will the courts use the reasonableness test or adopt a different or more stringent test?
- What are the implications of the use of the word 'basic' in relation to nutrition and health care services in s 28 (1) (c)? Does it imply a minimum core to the right to food and health care services that must be delivered to children as a matter of priority?

This short critique can merely raise these questions. It is intended to stimulate the debate on how s 28 can be interpreted in a way that gives it teeth in ensuring that children's basic needs are prioritised.

 Paula Proudlock is the Child Rights Programme Manager, Children's Institute, UCT.

## Universal access to social security rights

### Can a basic income grant meet the challenge?

Sandra Liebenberg

**A**ccess to social assistance for those unable to support themselves and their dependants is a fundamental human right enshrined in the Constitution.

In March this year, the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, chaired by Prof. Vivienne Taylor, released its consolidated report, entitled *Transforming the present – protecting the future*. It recommends a range of policy measures aimed at building a comprehensive social security system in South Africa.

The report's underlying philosophy is that social security reform should form part of a comprehensive social protection 'package'. This package of developmental strategies and programmes should be 'designed to ensure, collectively, at least a minimum acceptable living standard for all citizens'. Without such a core minimum of social provisioning, the constitutional promises of socio-economic rights, human dignity, equality and freedom will have a hollow ring.

### Key findings

The following findings of the Committee are of particular relevance to the constitutional obligation of ensuring universal access to social security:

- Depending on precisely which poverty line is used, between 45% and 55% of South Africans are living in poverty (between 20 and 28 million citizens).
- Income distribution in South Africa is highly unequal.
- High unemployment, including the massive net loss of formal sector jobs, and the growing shift towards peripheral, insecure work, is exacerbating the poverty situation.
- The impact of the HIV/Aids epidemic will exacerbate poverty and inequality.
- The patchwork of social grants inherited from the apartheid era is inadequate to meet the challenge of stamping out extreme poverty, and there are huge gaps in the system. Poor children over the age of 7 essentially have no access to social assistance (those under 7 qualify for a child support grant), nor do poor adults under the age of 60/65 (after which they qualify for a grant for the aged). Currently about 60% of the poor, or 11 million people, are not covered by the social security system.
- From a comprehensive social protection framework, 'the existing programme of social assistance grants is considerably high cost relative to its level of social effectiveness'.

The Committee concluded that the current social security programmes 'fail to satisfy the constitutional imperatives and thus make the State vulnerable to Constitutional Court challenges, and are clearly inadequate'.

The Committee's major policy recommendation is the phasing-in of a basic income grant (BIG). According to analysis conducted by the Committee, the grant 'has the potential, more than any other possible social protection intervention, to reduce poverty and promote human development and sustainable livelihoods'.

### Interpreting the constitutional right of access to social security

The *Grootboom* case is the leading precedent for interpreting the socio-economic rights provisions in the Constitution. In assessing whether the State has fulfilled its positive obligations to realise socio-economic rights, the Court will evaluate the 'reasonableness' of the measures adopted by the State to give effect to the rights. The following principles are key to the reasonableness test:

- the relevant programme must be co-ordinated, comprehensive and capable of facilitating the realisation of the right in question;
- it must include measures to provide immediate relief for those in desperate need and living in intolerable conditions or crisis situations;
- the legislation, policies and programmes adopted must satisfy the test of reasonableness in both their formulation and implementation;
- the right should be made progressively accessible over time to both a larger number and a wider range of people; and
- the availability of resources will be an important factor in assessing the reasonableness of the measures adopted by the State.

### Assessing the Committee's recommendations

Applying these principles to the findings of the Committee, it is evident that the BIG is the most

effective and appropriate measure for fulfilling the right of access to social assistance.

### A co-ordinated and comprehensive programme

In the first place, the grant represents a co-ordinated and comprehensive response to the current fragmented and inequitable system of social security. Expanding access to social insurance schemes (e.g. unemployment insurance, compensation for occupational injuries and diseases) and encouraging private savings (e.g. for retirement) are undoubtedly important components of a comprehensive social security system. However, high

structural unemployment, the decline in formal sector employment and the deep levels of poverty in South Africa render these measures an inadequate response to the challenge of ensuring universal access to social security.

Expanding access to social assistance must play a major role in a comprehensive social security strategy that is responsive to South African realities.

### Providing relief to those in desperate need

The BIG is, by its very nature, well suited to ensuring that the basic subsistence needs of destitute groups are met. In its assessment of the impact of the BIG, the Committee points out that the incidence of extreme poverty would be nearly completely eliminated, and 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'.***

closing the poverty gap would improve from 23% under the current grant system (37% assuming full take-up of existing grants) to 74%.

Although the grant will be paid universally, the Basic Income Grant Coalition (the BIG Coalition) has proposed that it be recuperated from middle and upper income earners through the income tax system. In this way, people living in poverty will ultimately end up being the real beneficiaries of the BIG.

The BIG will also benefit particularly vulnerable groups such as women and children living in poverty. It will substantially increase net household resources whereas an exclusive focus on children's social grants overlooks the fact that the entire household generally consumes whatever grants are received for children.

### Reasonable implementation

The design of the BIG proposal makes its reasonable implementation more feasible than the current social grants system. The Committee points out that the current system does not meet its full potential because of the way it is structured.

Some of the barriers to accessing social grants include means testing, rigid eligibility criteria contained in complex regulations and the high relative cost of applying for grants.

The BIG is designed to avoid administrative complexity and costs, as well as the perverse incentives of means testing and a range of other eligibility requirements.

The BIG Coalition proposes that

the tax system should be used to recover progressively a substantial portion of the cost of the grant. As the Committee points out, the South African Revenue Services (SARS) 'is one of the most capable arms of government', and the proposals to use the tax system will facilitate efficient administration of the BIG.

### The availability of resources

The BIG will have a significant developmental impact. As noted by the Committee, 'bly providing such a minimum level of income support,

people will be empowered to take the risks needed to break out of the poverty cycle'.

It also has the potential to support economic growth and job creation, thereby increasing the overall resources available to South African society. The Committee of Inquiry concluded that the implementation of a

universal system of social assistance grants is both feasible and affordable.

### Progressive realisation

While the right of access to social security can be realised progressively, the Constitutional Court has held that a significant number of desperate people in need must be afforded relief in the short-term. Two factors are important in justifying the urgent need to introduce a BIG:

- The huge gaps in access to social security provisioning inherited from the apartheid regime have existed for a number of years.
- Social assistance grants play a critical role in addressing the basic survival needs of people living in poverty. As long as these

needs remain unsatisfied, it is very difficult for the poor to access and utilise other government services and developmental programmes. For example, in rural areas many people lack the income for transport to get to health clinics, social welfare offices, or to seek employment. Income poverty thus results in a poverty trap for many people.

The Committee recommended phasing in a BIG, commencing with the extension of the child support grant to all children up to the age of 18. A phased approach is necessary to put in place the necessary institutional and administrative arrangements for implementing the BIG. However, this should be tied to a concrete plan of action for its speedy and effective implementation, including clear goals and benchmarks for measuring progress. This plan should be devised and implemented through a transparent process involving full participation of all stakeholders.

The ball is now in government's court. Civil society will be watching closely to see how government responds to the constitutional challenge of ensuring universal access to social security rights.

 Sandra Liebenberg is a Senior Researcher and Co-ordinator of the Socio-Economic Rights Project, Community Law Centre, UWC.

*The basic income grant is well suited to ensuring that the basic subsistence needs of destitute groups are met.*

This article is based on the Community Law Centre's submission to government on the Taylor Commission's report. The full submission, as well as the submission of the BIG Coalition, can be accessed on our website at: [www.communitylawcentre.org.za](http://www.communitylawcentre.org.za)